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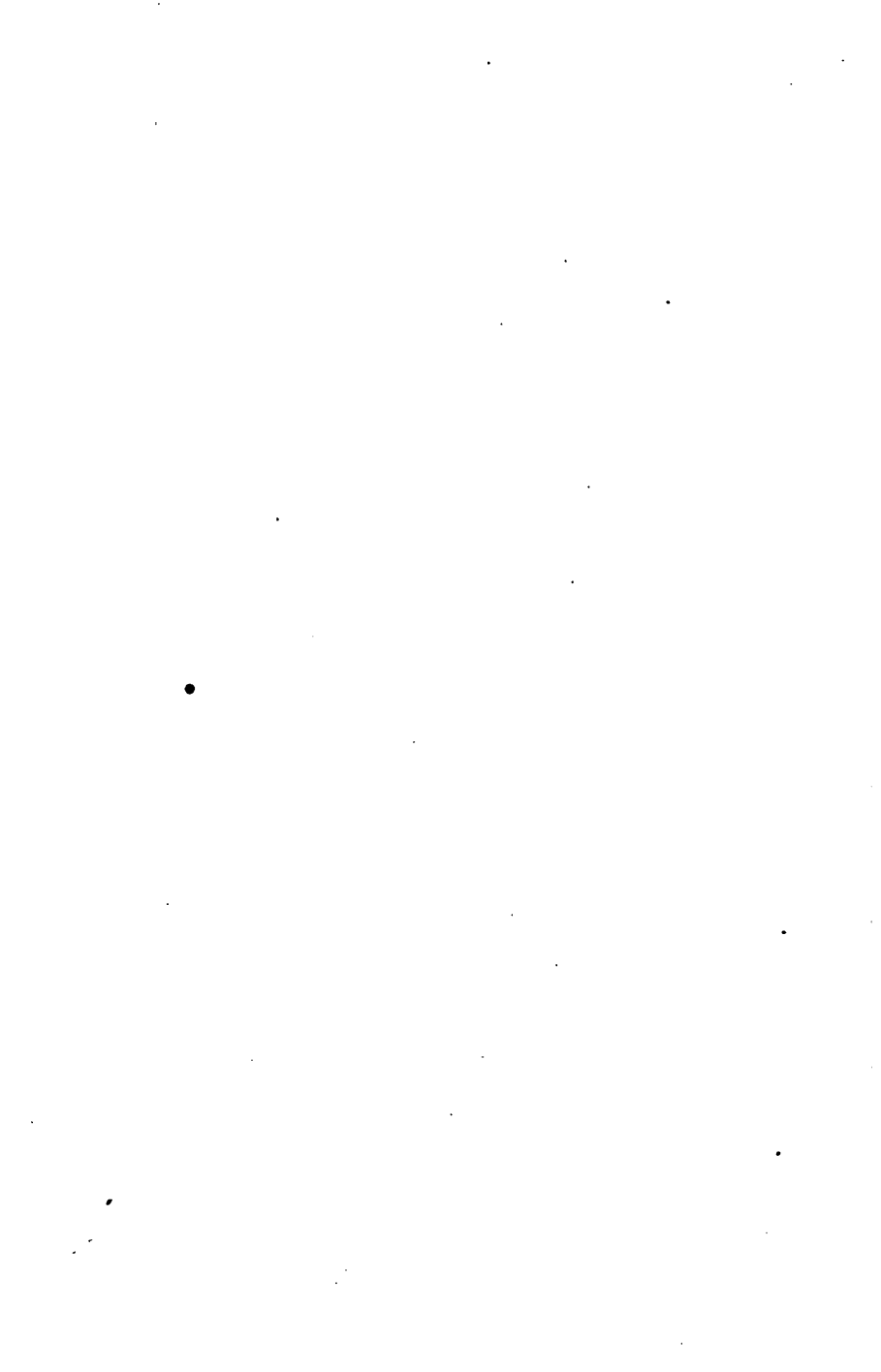


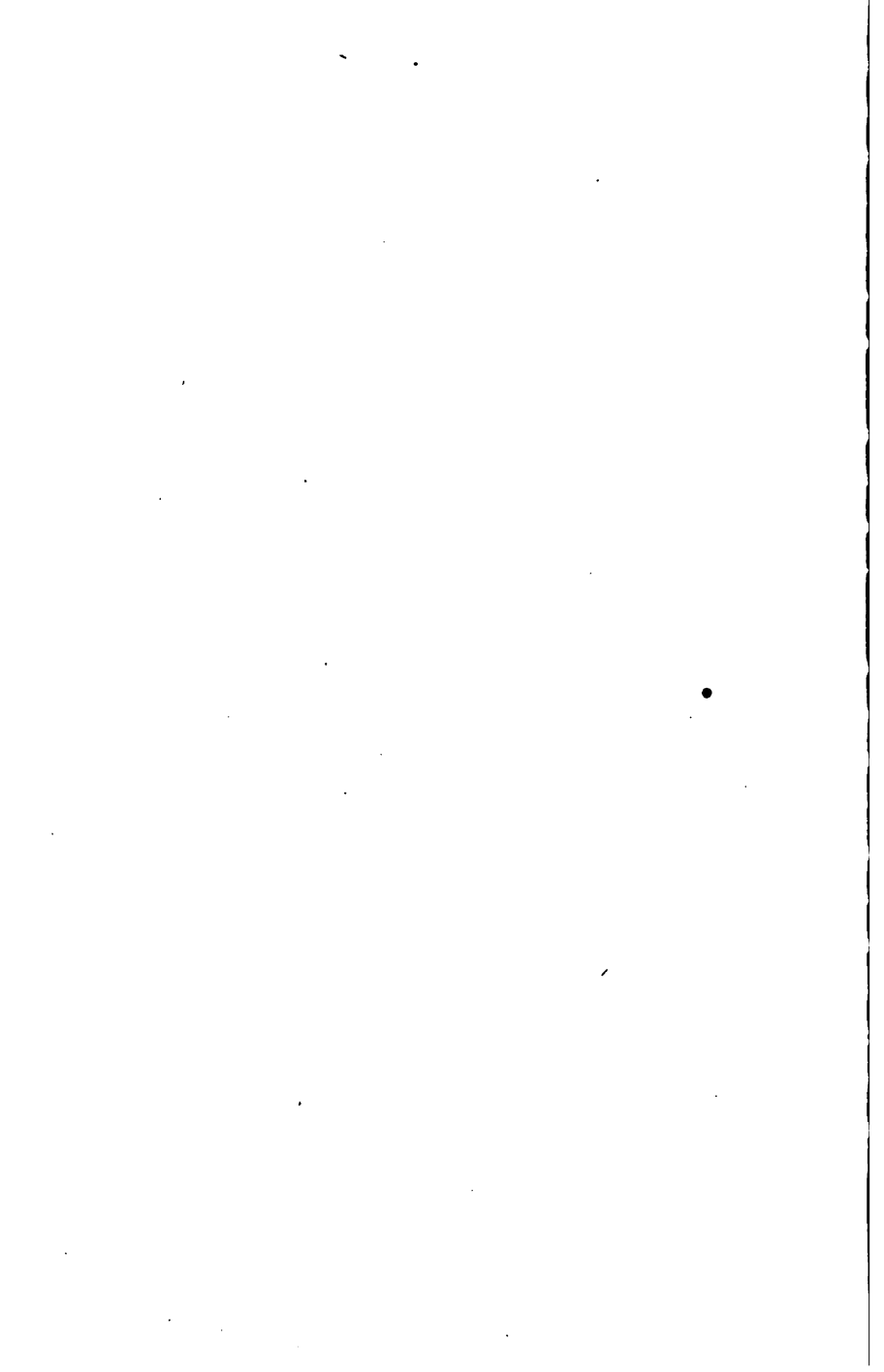
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THE  
HISTORICAL DEVELOPMENT  
OF THE  
JURY SYSTEM

BY

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ROCHESTER, N. Y.

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**E. R. ANDREWS, PRINTER, ROCHESTER, N. Y.**

TO THE MEMORY OF

**My Father**

WHOSE LIFE WAS ONE LONG UNSELFISH MANIFESTATION OF  
LOVE FOR HIS KINDRED, TO WHOSE FOND INDULGENCE  
I AM INDEBTED FOR THE EDUCATIONAL ADVAN-  
TAGES IT HAS BEEN MY FORTUNE TO  
ENJOY, THIS OFFSPRING OF MY  
MIND IS REVERENTIALLY  
INSCRIBED.

*The noblest invention for the support of justice ever produced.*—DE LOLME.

*A trial that hath been used time out of mind in this nation, and seems to have been coeval with the first civil government thereof.*—BLACKSTONE.

*An institution admirable in itself, and the best calculated for the preservation of liberty and the administration of justice, that ever was devised by the wit of man.*—HUME.

*The law of England has established the trial by judge and jury, in the conviction that it is the mode best calculated to ascertain the truth, and do the greatest amount of justice, in the great majority of cases.*—BENTHAM.

*The judgment by jurors is the true guaranty of individual liberty in England, and in every other country in the world where men aspire to freedom.*—SIEYES. (France).

*I deem that the best judicial system, which associates with the principal judge assessors, not selected, but chosen by lot; for, in such matters, ignorance which judges by sense is better than science which judges by opinion.*—BECARIA. (Italy).

*Not without cause do men require an external guaranty for the correct decision of questions of fact, and maintain that no better guarantee can be found than in "the agreement of the convictions of a certain number of irreproachable and independent men standing above the suspicion of partiality."*—WALTHER. (Germany).

*Springing up under the feudal despotism of the Plantagenets, it has survived alike their rule, that of the House of Tudor, and of the House of Stuart, and now flourishes with all its original vigor, under the wisest and mildest form of monarchy of which history makes mention; while during the same period, transplanted to a different hemisphere, it has struck deep its roots into the new soil, and is, perhaps, the most cherished institution of the greatest exemplar of free and intelligent government that the world has ever seen.*—SEDGWICK. (America).

## PREFACE.

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THE purpose of this treatise is to present—in a form as concise as the interest of the subject and a proper regard for accuracy permit—the curious history of the English Jury, an institution which, whatever its defects, must still be regarded as a fundamental factor in any system of jurisprudence based on the common law, and is the object of interested inquiry in countries where other systems prevail. The mode of treatment adopted is designed to render the work sufficiently accurate for the lawyer or the student, and withal sufficiently lucid for the general reader.

The author's claim for consideration is predicated on originality in the treatment and presentation of the materials at hand, rather than on originality of research; although in the latter respect he has taken pains to familiarize himself with foreign authorities not accessible in our own tongue, as well as to resort—with a view to verifying the sources whereon the conclusions of others are based, and on points affecting the genesis of the jury—to obscure records contained in

“Many a quaint and curious volume of forgotten lore.”

Originally read as an essay before the Academy of Political Science of Columbia College while a member thereof, with a simultaneous view to its service as a thesis to secure a higher academic degree from the College of the City of New York, the interest of his subject so grew upon the author, whilst its ramifications seemed so uncircumscribable, that at times he felt like exclaiming, with Goethe's pupil in magic:

“Die ich rief, die Geister,  
“Werd' ich nun nicht los.”

Continued investigation and successive revision gradually expanded the work into the form in which it is now submitted to the public.

The subject of the treatise is not sufficiently “practical”—*i. e.* readily convertible into current coin of the realm—to have caused the hope of mundane emoluments to call it into being. Conceived, executed and completed as aforesaid, it has been virtually a labor of love, and as such the author prefers it to be judged.

NEW YORK, May, 1894.

M. A. L.



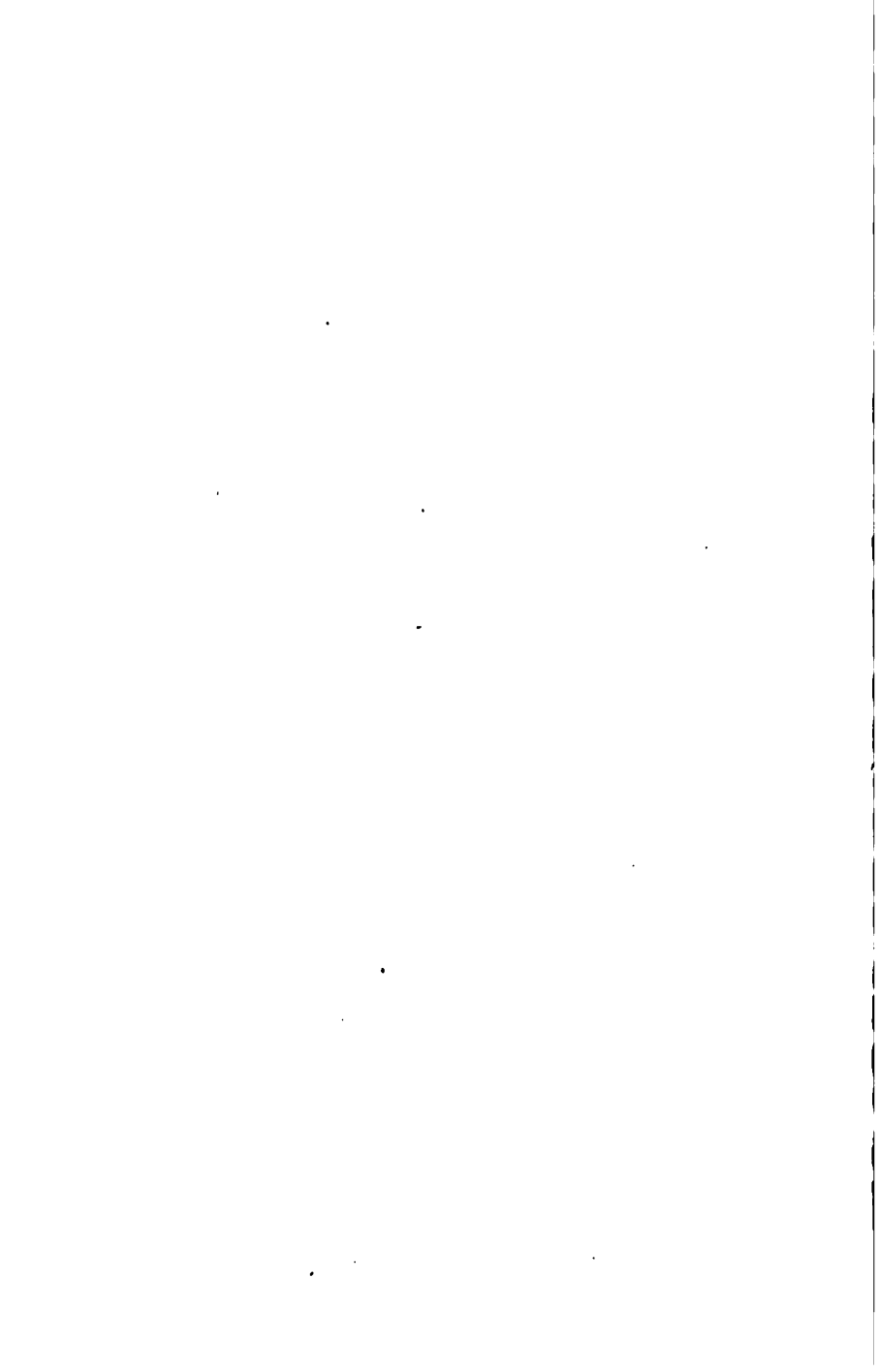
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NOTE.—Wherever, in a passage quoted verbatim from an author, a portion appears enclosed in [    ], the part so enclosed is to be understood as an *addendum* or interpolation of mine, in further explanation or elaboration of the text of the author cited.



# HISTORICAL DEVELOPMENT

OF THE

## JURY SYSTEM.

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### CHAPTER I.

#### GENERAL CHARACTERISTICS OF THE JURY.

The subject we propose to investigate is the historical genesis and gradual development of an institution which, to-day, is an inseparable element of English jurisprudence and an important factor in the administration of justice,<sup>1</sup> wherever the English or common law,

“ . . . . the State's collected will,  
O'er thrones and globes elate,  
Sits empress, crowning good, repressing ill.”

This purpose is not free from difficulties, for, while the nature and functions of the tribunal, as to-day existent, are sufficiently well comprehended, still the origin of that institution and the successive steps by which it was evolved are less clearly understood and subject to considerable misconception, as is evinced by the many and conflicting theories advanced in explanation thereof.

<sup>1</sup> “The subject of our next inquiries will be the nature and method of the trial by jury, called also the trial *per pais*, or by the country. . . . We are apt to impute the invention of this, and some other pieces of juridical polity, to the superior genius of Alfred the Great; to whom, on account of his having done much, it is usual to attribute everything. . . .

It is the object of this treatise to reconcile, as far as may be, these various views, to give to each well sustained suggestion its proper weight and effect during the formative period, and to trace its influence in the production of the result. The method of treatment is, in general, chronological; for the English jury is so closely interwoven with the historical and political development of the English nation, that every component which contributed to the formation and completion of the latter, had a concomitant effect upon the former;<sup>2</sup> accordingly, the history and features of each foreign factor will be described in connection with that period of our history at which it first made itself felt. For to the jury may be truly applied, what Maine says of law,<sup>3</sup> that it is a matter of growth, the result of the needs of the community in which it originated; and an institution—as another writer<sup>4</sup> well observes—which “does not owe its existence to any positive law; it is not the creature of an Act of Parliament establishing the form and defining the functions of the new tribunal. It arose . . . silently and gradually out of the usages of a state of society which has forever passed away.” We will, in the first place, regard its general aspect and characteristics as beheld to-day, and then proceed to consider whether, and in what respects, it is resembled by institutions of

Whereas the truth seems to be that this tribunal was universally established among all the northern nations. . . . Its establishment, however, and use in this island, of what date soever it be . . . was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it.”—Blackstone's Commentaries, bk. III. c. 23.

<sup>2</sup> “Jury trial in its modern form is certainly a product of English social and political forces.”—Prof. Pomeroy, Johns. Cycl., vol. II. art. *Jury*.

<sup>3</sup> Ancient Law, c. II.; cf. *id.*, c. V.

<sup>4</sup> Forsyth, Trial by Jury (pub. 1852, c. 1, § 1.

early days. The body with which we have to deal—in the language of an able Scotch jurist<sup>1</sup>—“is the institution by which disputed facts are to be decided for judicial purposes in the administration of civil or criminal justice, and which is in modern times familiar to us under the denomination of trial by jury. . . . The etymological derivation of the term is obviously from *jurō*, to swear, whence we find this institution called in forensic Latin *jurata*, and the persons composing it *jurati*” . . . When the object is inquiry only, this tribunal is sometimes called on inquest or inquisition, as in the instance of a grand jury or coroner’s inquest; but when facts are to be determined by it for judicial purposes, it is always styled a jury.”

This board of inquiry, then, is composed of “a body of men taken from the community at large, summoned to find the truth of disputed facts. Their office is to decide upon the effect of evidence and thus inform the court truly upon the question at issue, in order that the latter may be enabled to pronounce a right judgment. But they are not the court itself nor do they form part of it; and have nothing to do with the sentence which follows the delivery of their verdict.”<sup>2</sup> While, concerning the third characteristic element of our jury, De Lolme wrote<sup>3</sup> that they who have the power to discriminate between disputed facts and “to whom the law has thus exclusively delegated the prerogative of deciding that a punishment is to be inflicted,—those men with-

<sup>1</sup> Macculachlan, Eng. Cycl. III. 24.

<sup>2</sup> *Ad quæstionem facti, non respondent iudices; ad quæstionem legis, non respondent juratores.*—Co. Litt., 295 b. See Broom’s Legal Maxims, c. II. § 1.

<sup>3</sup> Forsyth, Trial by Jury, c. I. § 2.

<sup>4</sup> Const. of Eng., bk. 1, c. XIII.

out whose declaration the executive and the judicial powers are both thus bound down to inaction, do not form among themselves a permanent body, who may have had time to study how their power can serve to promote their private views or interest; they are men selected at once from among the people, who perhaps never were before called to the exercise of such a function, nor foresee that they ever shall be called to it again."

In other words, the jury is the sole judge of the weight of evidence adduced and the arbiter of compensation for contracts broken or injuries sustained, and is composed of men selected by lot and "sworn to declare the facts of a case as they are delivered from the evidence placed before them,"<sup>9</sup>—its province being to determine the truth of facts or the amount of damages in civil, and the guilt or innocence of the accused in criminal, cases.

This province is confined by the following limitations:<sup>10</sup>

(1) It is restricted to the consideration of matters proved by evidence at the trial;<sup>11</sup>

<sup>9</sup> Bouvier, Law Dict. I. 770.

<sup>10</sup> cf. Prof. Robertson, art. *Jury*, Enc. Brit. XIII.

<sup>11</sup> The jury is sworn to try all causes "according to the law and the evidence."—Hilliard, Am. Law, II. 244.

Where there is no conflict of evidence, the case is to be decided by the court without reference to the jury. *Mitchell v. Williams*, 11 Mees. & W. 206; *Halpin v. Third Ave. R. Co.* 8 Jones & S. 175.

So, where the sole question mooted at trial is the sufficiency of a defense in law: *Woarms v. Bauer*, 26 N. Y. S. R. 936, affirmed 11 Daly, 838.

But a nonsuit is not warranted "unless it appears that the plaintiff is not entitled to recover, after giving him the benefit of the most favorable view that a jury would be warranted in taking of the evidence." *McNally v. Phoenix Ins. Co.* 137 N. Y. 389.

On the other hand, if "at the close of the cause, a prima facie case be established on the part of the plaintiff, and it is undisputed by the defendant, it has been always usual to direct a verdict for the plaintiff." *People v. Cook*, 8 N. Y. 75.

(2) It is subject to the instructions of the judge, concerning the rules of law applicable;"

(3) It is influenced by the directions of the judge, as to weight, value, and materiality of evidence;"

(4) It is affected by the selection of the jurors from the locality of the action, whence they discharge their duties with a certain amount of independent local knowledge, whilom "counted on, and deemed essential to a just consideration of the case."

Two other qualifications may be added. After the rendition of a verdict in a civil case, it is still within the power of the trial judge to modify or even annul the same, in a proper case; for instance, "because the verdict

13 "It is the duty of the judge who presides at a trial, to determine what matters shall be presented to the jury, or received by the court as evidence. . . . Such evidence as is permitted to be detailed to a judge or jury is said to be competent; its effect upon the minds of the triers depends upon its credibility. Much testimony is admitted as competent, which is not credible, and many facts are rejected as incompetent, which might have produced belief." Pomeroy, *Mun. Law*, § 241.

Similarly, "there may be . . . witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact." *Bl. Com.*, bk. IV. c. XV.

14 "The province of a jury is to settle facts at issue between litigant parties, while that of the court is to apply to these [facts] the appropriate rules of law, and thereby fix the rights of the parties and provide a remedy for the injuries complained of." Washburn, *Study & Pr. of the Law* (5th ed.), p. 247.

"To keep the facts of the case before the jury, apart from the falsehood and coloring of parties, is the most useful function of the modern judge, whose influence is also considerable as a restraint upon the pleader." Grote's *Greece*, pt. II. c. XLVI.

"The parts of a judge in hearing are four: To direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule, or sentence." Lord Bacon, *Essay on Judicature*.

is for excessive or insufficient damages, or otherwise contrary to the evidence or contrary to law."<sup>14</sup>

Again, in a criminal case, a verdict of conviction, even when accompanied by a recommendation of mercy, does not control the sentence to be meted out by the presiding magistrate, who may impose the highest or lowest or any intermediate penalty prescribed by law as proper for the offense committed.

How, then, did this institution, whose features as currently administered have just been described, originate? What are the sources from whence it arose, and the forces by which it was developed? Did it spring forth, like Minerva from the brain of Jupiter, ready for action and fully equipped with forensic vesture and legal armament, or was its development the result of the gradual accretion of successive strata of growth? As stated above, various and conflicting theories are advanced to answer these queries.

"Many writers of authority," says Canon Stubbs,<sup>15</sup> "have maintained that the entire jury system is indigenous in England," some deriving it from Celtic tradition based on the principles of Roman law, and adopted by the Anglo-Saxons and Normans from the people they had conquered, others have regarded it as a product of that legal genius of the Anglo-Saxons of which Alfred is the mythic impersonation,<sup>16</sup> or as derived by that nation from the customs of primitive Germany or from

<sup>14</sup> N. Y. Code Civ. Proceed., § 999. And an appeal may be taken from the judge's order, granting or refusing a new trial on such grounds.

<sup>15</sup> Const. Hist. of Eng. vol. I. c. XIII. (pp. 655-656).

<sup>16</sup> "The English jury is of indigenous growth." Forsyth, Trial by Jury, p. 13.

<sup>17</sup> cf. Blackstone, *ante*, page 1, note 1; Hume, Hist. of England, c. II. Dean, British Const., c. I.

their intercourse with the Danes. Nor even, when it is admitted<sup>18</sup> that the system of recognition was introduced from Normandy, have legal writers agreed as to the source from which the Normans themselves derived it. One scholar maintains that it was brought by the Norsemen from Scandinavia;<sup>19</sup> another, that it was derived from the processes of the Canon Law; another, that it was developed on Gallic soil from Roman principles; another, that it came from Asia through the Crusades." An American authority insists that it "is undoubtedly a development of English institutions and civilization."<sup>20</sup> Again, it is suggested that it was borrowed by the Angles and Saxons from their Slavonic neighbors in northern Europe; it has been traced to the *assises de Jerusalem* of Godfrey de Bouillon;<sup>21</sup> it is even claimed to be of divine origin;<sup>22</sup> and, finally, a French scholar<sup>23</sup> despairingly exclaims: "*Son origine se perd dans la nuit de temps!*"

<sup>18</sup> This is the view of Reeves (*Hist. Eng. Law*, I. 24), and Palgrave (*Eng. Com.* I, 243); cf. *post*, chap. VI.

<sup>19</sup> Judge Cooley remarks: "With much variety of form, modes of trial essentially similar to that by jury prevailed among both the Teutonic and the Scandinavian nations, from a very remote antiquity." *Am. Cycl.* IX. art. *Jury*.

The Scandinavian institutions are described *in extenso* by Prof. Repp, in his rare *Historical Treatise on Trial by Jury, Wager of Law, etc.*, in Scandinavia, copious extracts wherefrom may be found in Forsyth (c. II., pp. 15-37), and who concludes that they were *judicial tribunals*.

For historical reasons referred to hereinafter, it seems improbable that these institutions in anywise influenced the growth of the English jury, unless very remotely through the medium of the Normans; and they or any of them certainly never flourished on English soil: hence no great consideration is given them in these pages. See *post*, chap. IV. note 20.

<sup>20</sup> Pomeroy, *Mun. Law*, § 104.

<sup>21</sup> cf. art. *Jury*, by F. W. Whitridge, *Lalor's Cycl. Polit. Science*, II. 653.

<sup>22</sup> ". . . Their institution being ascribed by Bishop Nicholson to Woden himself." *Bl. Comm.* bk. III. c. XXIII.

<sup>23</sup> Bourgoignon, *Memotre sur le Jury*.

According to Robertson,<sup>24</sup> "the true answer is, that forms of trial resembling the jury system in various particulars are to be found in the primitive institutions of all [Aryan] nations." That which comes nearest in time and character to trial by jury is the system of recognition by sworn inquest, introduced into England by the Normans . . . the instrument which the lawyers in England ultimately shaped into trial by jury." The name "Recognition," Bracton tells us,<sup>25</sup> is deduced from the fact that the participants "acknowledged" a disseisin or dispossession by their verdict, and the inquest itself was "directly derived from the Frank capitularies, into which it may have been adopted from the fiscal regulations of the Theodosian Code and thus own some distant relationship with the Roman jurisprudence."<sup>26</sup> This is the system which, Lord Campbell writes,<sup>27</sup> "in the fifth Norman reign had nearly superseded the simple juridical institutions of our Anglo-Saxon ancestors;" while an eminent American jurist, after observing that investigation has shown among Norman legal usages<sup>28</sup> traces more closely resembling our

<sup>24</sup> Art. *Jury*, Encycl. Brit. XIII.

<sup>25</sup> "The jury does not owe its existence to any preconceived theory of jurisprudence, but . . . gradually grew out of forms previously in use, and was composed of elements long familiar to the people of this country." Forsyth, *Trial by Jury*, p. 6.

Professor Freeman, in his essay on *The Growth of the English Constitution* (c. I.) comments on the close and striking likeness between the earliest political institutions of the Greek, the Italian, and the Teutonic. of. the same author's *Norman Conquest*, vol. V. p. 451.

<sup>26</sup> *De Legibus et Consuetudinibus Angliæ*, I. 5.

<sup>27</sup> Stubbs, *supra*, citing Brunner, *Schwurgericht*, p. 87; Palgrave, *Eng. Com.*, p. 271.

<sup>28</sup> *Lives of the Chief Justices of England*, vol. I.

<sup>29</sup> The great storehouses for Norman and Anglo-Norman jurisprudence are the compilation called '*Grand Coutumier*' and the *Rotuli Normanniæ*,

form of jury trial than anything afforded by the system of the Anglo-Saxons, concludes :

"We regard it, therefore, as certain that all these influences contributed to establish this mode of trial in England, and to shape it as we know it to exist there. Indeed, it was not until all of them had had an opportunity of completing their work, that we find what we should now call a jury."<sup>20</sup>

A due regard for the definiteness of legal phraseology calls for some comment on the meaning of Law and Fact, terms so frequently employed in the course of this work. *Law*, in its widest sense, is a rule of action; in its technical sense, it is a general rule of human action, taking cognizance only of external acts, enforced by a determinate human authority paramount within a state.<sup>21</sup> Whether the rule so enforced be moral or pernicious, is impertinent to the question. "The existence of law is one thing, its merit or demerit another."<sup>22</sup>

on the former of which the jurisprudence of the Isle of Jersey still is based; thus in criminal cases an appeal may be taken from the verdict of a petit police jury to the grand jury, called the *Grand Enquête*.

<sup>20</sup> Cooley, *Am. Cyel.* IX. pp. 721, 722.

<sup>21</sup> Cf. Holland, *El. of Jurisp.* c. II. III. Bishop Hooker (*Eccles. Polity*, bk. I.) beautifully says: "Of law there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world; all things in heaven and earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power."

<sup>22</sup> Austin on *Jurisp.* (Eng. ed.) 220, note. In accordance with this view, the finale of the familiar definition, "commanding what is right and prohibiting what is wrong,"—laid down by "the orthodox Judge Blackstone," as Gibbon calls him—is now generally eschewed, as paradoxical *per se* as well as erroneous in fact, "for though the municipal law may seldom or never command what is wrong, yet in ten thousand instances it forbids what is right" (Chase's *Blackstone*, 9, note 3). Often, too, it commands or forbids an act, of which neither right nor wrong is predicable, e. g. the imposition of import duties under, and the prohibition of export duties

Again, "although human actions are the subject-matter about which law is conversant, they are not essential to its existence; for the rule is the same, whether its appli-

by, the Federal Constitution. So with sanitary and (generally) police regulations.

The whole body of law is either Public or Private. Public Law comprises International and Political or Municipal Law, the latter being the *ius civile* of the Institutes of Justinian and defined (Kent, Com. pt. III. lect. 20) as "a rule of civil conduct, which is prescribed by the supreme power in a state," and regulates the intercourse of such state with its people and of the people with one another. American Municipal Law is, as to its object, divisible into Federal and State, and, as to its origin, into Common (or "unwritten") and Statute (or "written") law. Private Law comprises Civil Law, Criminal Law, the Law of Procedure (civil and criminal), and Sanitary and Supervisory regulations, now generally classified under the head of "police power." For the distinction between Law and Equity, see *post*, chap. V. note 15, chap. VIII. note 12; for that between Customary and Enacted law, see Maine, *Early Hist. of Institutions*, lect. XIII. between Prospective and Retrospective (and, under the latter head, *ex post facto*) laws, see Chase's *Blackstone*, 11, 12, notes 4-6.

The history and development of the Common Law are considered in the treatise of Judge O. W. Holmes, Jr. ("On the Common Law"),—also in Reeves' very technical but trustworthy *History of the English Law*, and in the first part of Spence's *Equitable Jurisdiction of the Court of Chancery*,—and learnedly discussed in the Introduction to Prof. Bigelow's "*Placita Anglo-Normannica*, or Cases from William I. to Richard I.," covering the period 1066-1195. The *Rotuli Curie Regis* [King's Bench], edited by Palgrave, extend from 1195 to 1199. The "State Trials" (edited by Hargrave, later by Howell) include cases, mostly in King's Bench, from 1163 to 1820. The Year Books form a continuous record of cases in King's Bench, Common Pleas, Exchequer and Assises from 1222 to 1537. At the latter date, official reports ceased in England for more than three centuries, and private persons (casually until 1785, thereafter regularly) published reports, generally known by the names of their editors. In 1865, systematic reporting was resumed, the "Law Reports" being published under the supervision of an official Council of Law. In the United States, there are usually official reporters for the highest courts, cases in the others being generally published by private enterprise, often with official sanction. Cf. Soule, *Lawyer's Reference Manual*; Wallace, *The Law Reporters*. See, generally, the learned paper on the materials of English Legal History, by Prof. F. W. Maitland, in *Pol. Sci. Quart.*, vol. IV., pp. 496-518, 628-647.

In this connection a note of Sedgwick (*Stat. & Const. Law*, c. II.) is of interest: "As late as the middle of the 14th century, all the oral pro-

cation is called forth or not. . . . The rule continues in abstraction and theory, until an act is done on which it can attach. . . . The maxim, *ex facto oritur jus*" must be understood in this sense; and the duty of judicial tribunals, consequently, embraces the investigation of doubtful or disputed facts, as well as the application of the principles of jurisprudence to such as are ascertained."<sup>44</sup>

*Fact* is a term most difficult to define—so much so that Mr. Justice Stephen (in the third edition of his Digest of the Law of Evidence) abandoned the attempt previously made. Webster's definition (ed. 1859) is: "Anything done, or that comes to pass; an act; a deed; an effect produced or achieved; an event." Negatively, a learned American jurist" suggests that "nothing is a question of fact which is not a question of the existence, reality, truth of something." Anything which is the

ceedings in open court were in the French tongue, when by the 36th Edward III. c. XV. (1362), the English was introduced. . . . For nearly 300 years [from 1362 to the Commonwealth] English was the language of oral discussion, French of the reports, and Latin of the records; French also being mainly the language of the statutes from 1275, till the accession of Richard III. (1483). . . . Nor did the Latin disappear from the records till 4 Geo. II. c. 28 (1731)."

See, as to "English Legal History" generally, a learned paper by Prof. F. W. Maitland, in *Political Science Quarterly*, vol. IV. nos. 3 and 4.

<sup>43</sup> A court does not charge a jury with matter of law in the abstract, but only upon the law as growing out of some supposition of fact: *Bushell's Case*, Vaughan 135.

<sup>44</sup> *Best Ev.* (Chamberlayne's ed.), § 1.

<sup>45</sup> Prof. Thayer, "Law and Fact" in *Jury Trial*, 4 *Harvard Law Rev.* 152.

Cf. Bentham (*Jud. Ev.* 49, 50): "The existence of a certain state of things is a positive or affirmative fact, the non-existence of it is a negative fact. But the only really existing facts are positive ones,—for a negative fact is nothing more than the non-existence of a positive fact; and the non-existence of a negative fact is equivalent to the existence of the correspondent and opposite positive fact." See *post*, chap. XII. note 50, as to what facts are relevant to each other.

subject of testimony is "matter of fact," while "matter of law" is the general law of the land of which courts take judicial cognizance." Evidence is the means or method by which a fact under judicial examination may be proved or disproved." "Whether there be *any* evidence, is a question for the judge. Whether *sufficient* evidence, is for the jury."<sup>30</sup>

In any event, it is clear that the formula of Coke, hereinabove quoted, "was never meant to be taken absolutely. . . . It relates to *issues* of fact, and not to the incidental questions that spring up before the parties are at issue. The jury has to do with only a limited class of questions of fact, namely, questions of ultimate fact." "In general, issues of fact, and only issues of fact, are to be tried by jury; when they are so tried, the jury and not the court are to find the facts,"<sup>31</sup> and the court and not the jury is to give the rule of law;<sup>32</sup> the jury are not to refer the evidence to the judge

<sup>30</sup> Cf. Best Ev. (Chamberlayne's ed.) 6, note 1.

<sup>31</sup> 1 Greenl. Ev. c. I.

<sup>32</sup> Per Buller, J., *Company of Carpenters v. Hayward*, Doug. 375. Cf. *Chandler v. Roeder*, 65 U. S. 24 How. 224, 16 L. ed. 633.

<sup>33</sup> *Ante*, note 6. It recurs Co. Litt. 155b, 226a; 8 Coke 155a, etc. According to Biener (Eng. Geschw. I. c. 2, 5) this maxim first took shape in England in the sixteenth century. In Bushell's case, *supra*, Vaughan, Ch. J., refers to it rather deprecatingly as a "sing-song," *decantatum*.

<sup>34</sup> Thus in 1612 it was decided to be the office of jurors "to *adjudge upon their evidence* concerning matter of fact, and thereupon to give their verdict." Littleton's Case, 10 Coke, 56b.

<sup>35</sup> *Non est juratoribus judicare*, was the judgment in a case (Dyer, 106b) decided in 1554. Already in the Year Books many cases occur, throughout the 13th and in the 14th century, "in which the need of entering special matter [on the record] is pointed out, in order to prevent the laymen from passing on questions of law." See the learned essay on "The Jury and its Development" (by Prof. Jas. B. Thayer) in 5 Harvard Law Rev., where such cases are set out at pp. 312-316.

and ask his judgment upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for judgment upon these.”<sup>48</sup>

<sup>48</sup> *Ibid*, pp. 149, 150; cf. chap. XII. note 47.

## CHAPTER II.

### THE DIKASTS OF GREECE.

The development of the jury may justly be said to measure the march of civilization. "In the early stages of society . . . causes are decided by persons of station and authority, without reference to any supposed special qualification on their part; it is only as civilization advances and laws become more complicated, that the study and application of them assumes the form of a distinct profession."<sup>1</sup>

Among the Oriental nations, no traces of jury trial are discoverable. With the Jews and Phœnicians (who may be taken as fair representatives) the administration of justice was monopolized by the priests, who were judges both of law and fact,<sup>2</sup> paying but little deference

<sup>1</sup> Best, Ev. § 83, note.

<sup>2</sup> "For all manner of [civil] trespass, whether it be for ox, for ass, for sheep, for raiment, or for any manner of lost thing which another challengeth to be his, the cause of both parties shall come before the judges; and *whom the judges shall condemn*, he shall pay double unto his neighbor." Exodus, XXII. 9.

The judges here referred to must not be confounded with Samuel and his fifteen predecessors (among whom Deborah), who under that appellation directed the affairs of Palestine at intervals during the four and a half centuries between the death of Joshua and the reign of Saul. Their office "was rather that of the military dictator, raised on an emergency to the command of the national forces. What his judicial functions could have been, seems very doubtful, as all ordinary cases would fall under the cognizance of the municipal judicatures." Milman, *History of the Jews*, bk. VI.

For further particulars concerning the judicial system under the Jewish theocracy, see the learned treatise on *Mosaisches Recht*, by J. D. Michaelis (2d ed. 1785). It appears that judges were generally taken from the tribe of Levi, that their persons were sacrosanct, and that butchers were debarred from the dispensation of justice, "as in England,

to precedent and deciding each case without much reference to any general principles.

In ancient Egypt, justice was administered by a president and thirty associates, ten being selected by the king from each of the three great cities (Heliopolis, Thebes and Memphis) respectively. The pleadings and proceedings were all in writing, no advocates being admitted, "on the ground that they darkened the administration of the laws," and that by their exclusion "the clever and tricky had no undue advantage over the simple and honest, as they could not avail themselves of rhetorical flourishes and appeals to the passions." Judgment was pronounced by the president placing an image of Truth, suspended from a golden chain round his neck, upon the pleadings of the party in whose favor the court had decided.<sup>3</sup>

"The essence of the trial by jury is the determination of questions [of fact] arising in actions at law by a select body of persons, who, without holding permanent judi-

where the laws likewise secluded butchers from serving on the magistracy of the twelve [i. e., the jury] because the necessary forbearance or compassion for blood or pain may not be expected from them." (Vol. III. § 164.)

Criminal cases were tried by the elders of the city at its gate. *Vide* Deut. XXI. 19; Josh. XX. 4; Jerem. XXVI. 10.

<sup>3</sup>Diodorus Siculus, cited in Forsyth's *Hortensius* (Am. ed. 1882) pp. 15, 16.

Thereon seems to be predicated the notion of Sir Thomas More, in whose ideal republic advocates find no place. "They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters and to wrest the laws; and therefore they think it is much better that every man should plead his own cause and trust it to the judge." More's *Utopia*, bk. II. (Alden's ed.) p. 82, where we also read that "they have but few laws, and . . . very much condemn other nations, whose laws, together with the commentaries on them, swell up to so many volumes."

*cf. post*, note 11.

cial offices, come from among the people for this purpose and, after their work is done, return to them. In Asia we find nothing of this at any time; and nothing of it in history, until the *δικαστηριον* of Athens."<sup>4</sup>

From this body our jury is said to be derived, according to the view maintained in a treatise published in the 18th century by Dr. Pettingal.<sup>5</sup> Forsyth<sup>6</sup> dismisses it without much ado as an "ingenious" theory; but the American jurist just quoted<sup>7</sup> appears to regard it with much favor, and it is approvingly cited as authority and summarized by Mr. Will.<sup>8</sup> According to this theory,<sup>9</sup> the origin of the jury must be sought with the ancients, while the accepted rendition of the Greek *δικασται* (as of the Roman *judices*), and the conception annexed to them, viz: "Presidents of courts," are erroneous; for in Athens these functions were performed by the

<sup>4</sup> Cooley, Am. Cycl., vol. IX. art. *Jury*.

The learned author would seem in error, however, when he regards the institution as "regulated if not introduced by Solon." The foundation was indeed laid by him; but the *dikasteries* were first popularized and made instruments for the conviction of criminals by Kleisthenes, while the credit of extending their functions to disputes between man and man and providing for their permanency by means of a fixed rate of compensation belongs to Pericles. "The building, afterward so spacious and stately, was erected on a Solonian foundation, though it was not itself Solonian." Grote's Greece, pt. II. c. XXXI., cf. *id.*, c. XII.

<sup>5</sup> "An enquiry into the use and practice of juries among the Greeks and Romans," (Lond. 1769) by John Pettingal, D. D.

<sup>6</sup> Trial by Jury, c. I. note at p. 12.

<sup>7</sup> Cooley, *supra*.

<sup>8</sup> Wharton, Law Lex. (5th ed.) p. 516.

<sup>9</sup> This view is sustained by one of the greatest of historical authorities. "The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country." Gibbon, Rome, c. 44.

It is also maintained by Hermann (Pol. Antiq. of Greece), Felton (notes to Arist. Clouds), Liddell and Scott (Gr. Lex.), and other eminent scholars.

Archons respectively." Hence whenever "*ἀνδρες δικάσται*" are addressed by the Greek orators, they are to be considered as men whose duty it was, after hearing the witnesses and other evidence, as also the addresses of the advocates, "to report their opinion and verdict to the presiding Archon—the term being virtually equivalent to our "gentlemen of the jury."

That the direct influence of the Greek—through the medium of the Roman—on the formation of the British

<sup>10</sup> Thus the term 'judges' is applied by Kennedy "to the six junior archons, to avoid the uncouth title of 'Thesmothetes.' It does not indeed . . . convey a perfect idea of the official duties which they had to discharge, yet it is by no means inappropriate, seeing that the most important part of them were of a judicial nature." *Orations of Dem.*, II. 48, note 3.

<sup>11</sup> There were anciently no lawyers in Greece to argue the case, but the parties to a suit, or their friends, were wont to plead their own cause. "The addresses of orators or parties," Grote tells us, "formed the prominent part of the procedure, and the depositions of witnesses only a very subordinate part." And the prejudice of the populace against the Sophists was mainly due to the fact, that "at a time when every citizen pleaded his own cause before the dikastery, they imparted, to those who were rich enough to purchase it, a peculiar skill in the common weapons, which made them like fencing masters or professional swordsmen amidst a society of untrained duellists." (*Hist. of Greece*, c. XLVI.)

And again: "The dikast heard little of the naked facts, the appropriate subjects for his reason—but he was abundantly supplied with the plausible falsehoods, calumnies, irrelevant statements and suggestions, etc., of the parties"—there being no judge to restrict the evidence, restrain the pleaders, regulate the trial, and instruct the jurors.

"We see in the remaining productions of the Attic orators how much there is of plausible deception, departure from the true issue, and appeals to sympathies, antipathies, and prejudices of every kind, addressed to the dikasteries," to whose members, however, continual practice presumably imparted considerable skill in the detection of fallacies. But frequently, the historian thinks, it cannot be doubted that "success depended less upon the intrinsic merits of a case than upon apparent airs of innocence and truth telling, dexterity of statement, and good general character, of the parties, their witnesses, and the friends who addressed the court on their behalf. . . . This is true of Rome as well as of Athens." *Ibid.*

jury could at best have been extremely slight, will appear when we consider the effect and fate of the Roman dominion over Britain;<sup>12</sup> but the deductions drawn in reference to the functions and characters of the dikasts are plausible, and will be found fully sustained by the comprehensive description of that institution to be found in Grote's "History of Greece," extracts from which are subjoined—presenting in a terse and masterly manner the essential elements of the Athenian institution,<sup>13</sup> and graphically contrasting its characteristic features with those of the modern tribunal.

For service as dikasts, during the period best known to history, "6000 citizens above thirty years of age were annually selected by lot out of the whole number, 600 from each of the ten tribes: 5000 of these citizens were arranged in ten panels or decuries of 500 each, the remaining 1000 being reserved to fill up vacancies in case of death or absence among the former. The whole 6000 took a prescribed oath, couched in very striking words; after which every man received a ticket inscribed with his own name as well as with a letter designating his decury. . . . Each of these decuries sitting in judicature was called the *Heliea*."<sup>14</sup> When

<sup>12</sup> *Post*, chap. V.

<sup>13</sup> It should be observed that what is here said of the dikasts, applies to Attica and its dependencies only. Thus in Sparta they appear to have been unknown, judicial and jural functions being merged in the hands of the Gerontes. During the hegemony of Athens, however, suitors were wont to be summoned from all parts of Greece, and compelled to submit to the Athenian jurisdiction and methods of trial. (cf. Forsyth, *Hortensius*, c. II.)

<sup>14</sup> Grote's *Greece*, pt. II. c. XXXI. The extracts collated below are from c. XLVI.

*Heliea*, originally a public place or hall, in which the chief law court sat for the trial of state offenses; then, a name applied the court itself.

causes (civil or criminal) were ready to be tried, the archons determined by lot the decury, and next the court in which it was to officiate—so that the case each was to try remained unknown until the time of trial.

“The dikasteries provided under the system of Pericles [467–428 B. C.] varied in number of members; we never hear of less than 200 members—most generally of 500—and sometimes also of 1000, 1500, 2000 members on important trials.” Each man received pay, . . . after his day’s business was over, of three oboli<sup>15</sup> or half a drachma”—*i. e.* about nine cents, though the purchasing value was several times that amount. “The dikasteries established by Pericles were inaccessible both to corruption and intimidation; their number, their secret suffrage, and the impossibility of knowing beforehand what individuals would sit in any particular cause, prevented both the one and the other. And besides that, the magnitude of their number, extravagant to our ideas of judicial business, . . . served farther to render the trial solemn and the verdict imposing on the minds of parties and spectators. . . .

From *ἀλγες* (*confertus*), crowded, thronged. cf. Felton’s edition of Aristophanes’ *Clouds*, note 863.

Here it is further stated that the men constituting these bodies were citizens above the age of thirty, called Heliasts, and “were also members of the popular assembly, and thus performed both legislative and judicial functions.” This suggests an analogy with the Anglo-Saxon tithing and frankpledge [*post*, chap. VI.].

<sup>15</sup> In such cases the dikastery was formed by the union of several decuries. Though each panel (decury) nominally included 500 members, they probably seldom all attended.—Hermann’s *Pol. Antiq. of Greece*, p. 285.

<sup>16</sup> Anciently the Heliastic fee was but one obol:

“For the first juror’s obol I received,  
You got a go-cart on the Feast of Zeus.”

Aristophanes, *Clouds*, 864, 865.

It may be noted that as late as 1623 (according to Powell’s “*Attorney’s Academy*,” published that year) jurors in London received a fee of eightpence each, and talesman fourpence only.

"Taking the general working of the dikasteries, we shall find that they are nothing but jury trial applied on a scale broad, systematic, unaided, and uncontrolled, beyond all other historical experience—and that they therefore exhibit in exaggerated proportions both the excellences and the defects characteristic of the jury system, as compared with decision by trained and professional judges. All the encomiums which it is customary to pronounce upon jury trial will be found predicable of the Athenian dikasteries in a still greater degree; all the reproaches which can be addressed on good ground to the dikasteries will apply to modern juries also, though in a less degree. . . .

➤ "But in Athens the dikasts judged of the law as well as of the fact. The laws were not numerous, and were couched in few, for the most part familiar, words. To determine how the facts stood, and whether, if the facts were undisputed, the law invoked was properly applicable to them, were parts of the integral question submitted to them, and comprehended in their verdict. Moreover, each dikastery construed the law for itself without being bound to follow the decisions of those which had preceded it, except in so far as such analogy might really influence the convictions of the members." They were free, self-judging persons—unassisted by the schooling, but at the same time untrammelled by the awe-striking ascendancy, of a professional judge—obeying the spontaneous inspirations of their own con-

<sup>11</sup> This is in a measure true of the modern jury, particularly as regards verdicts in cases of tort. Thus, in suits brought to recover damages for personal injuries, or for breach of promise to marry, one jury will find the plaintiff entitled to thousands of dollars, another—in a case involving the same issues—may award the munificent sum of six cents.

sciences, and recognizing no authority except the laws of the city, with which they were familiar. . . .

“As to the effects of jury trial in diffusing respect to the laws and constitution—in giving to every citizen a personal interest in enforcing the former and maintaining the latter—in imparting a sentiment of dignity to small and poor men, through the discharge of a function exalted as well as useful—in calling forth the patriotic sympathies, and exercising the mental capacities of every individual—all these effects were produced in a still higher degree (than by our jury even) by the dikasteries of Athens; from their greater frequency, numbers, and spontaneity of mental action, without any professional judge, upon whom they could throw the responsibility of deciding for them. . . .

“As an organ for judicial purposes, the Athenian dikasteries were thus a simple and plenary manifestation of jury trial, with its inherent excellences and defects both brought out in exaggerated relief. They insured a decision at once uncorrupt, public-minded, and imposing—together with the best security which the case admitted against illegal violences on the part of the rich and great. Their extreme publicity—as well as their simple and oral procedure, divested of that verbal and ceremonial technicality which marked the law of Rome even at its outset—was no small benefit. And as the verdicts of the dikasts, even when wrong, depended upon causes of misjudgment common to them with the general body of the citizens, so they never appeared to pronounce unjustly, nor lost the confidence of their fellow citizens generally. But whatever may have been their defects as judicial instruments, as a stimulus both to thought

and speech, their efficacy was unparalleled, in the circumstances of Athenian society. . . . The susceptibilities of the Athenian mind, as well as the previous practice and expansive tendencies of democratical citizenship [instituted by Solon, about 600 B. C.] were also essential conditions—and that genuine taste for sitting in judgment and hearing both sides fairly, which, however Aristophanes<sup>18</sup> may caricature and deride it, was alike honorable and useful to the people. . . .”

The method of setting this legal apparatus in motion was as follows:<sup>19</sup> “Every one to whose lot it fell to serve as jurymen received, after taking the oath, a tablet, inscribed with his name and the number of the division to which he was to belong during the year. On the morning of every court day, recourse was again had to lots to decide in which courts the divisions should respectively sit for that day, and the suits of which they should take cognizance, since there were many which could be decided only in certain courts. The number of these courts of justice is uncertain; most of them, however, were in the Agora, and were distinguished by numbers and colors. Staves with corresponding marks were handed to the jurymen at the entrance of each court, as symbols of their judicial power, and at the same time tickets, on presenting which, from the time of Pericles, they received their fees” from the public paymasters.

“The establishment of these paid dikasteries at Athens was thus one of the most important and prolific events

<sup>18</sup> Instances are quoted in Browne, *Law and Lawyers in Literature*. Also *post*.

<sup>19</sup> Hermann, *Polit. Antiq. of Greece*, p. 235.

in all Grecian history. The pay helped to furnish a maintenance for old citizens, past the age of military service. Elderly men were the best persons for such a service,\* and were preferred for judicial purposes both at Sparta and, as it seems, in heroic Greece. Nevertheless, we need not suppose that all the dikasts were either old or poor, though a considerable proportion of them were so, and though Aristophanes selects these qualities as among the most suitable subjects for his ridicule. . . . As the fact stands, we may suppose that the 6000 Heliasts who filled the dikasteries were composed of the middling and poorer citizens indiscriminately; though there was nothing to prevent the richer, if they chose to serve.”<sup>20</sup>

More recent investigators, however, value less highly the character of the dikasts and take a less roseate view of the efficacy of the dikasteries. Thus the learned author of “*Hortensius the Advocate*” thinks that “the constitution of the courts of law at Athens was radically bad,” and quotes Bishop Thirlwall to the effect that it “introduced uncertainty and confusion into all the relations and transactions of private life, and contributed more than any other cause to the public disasters, while it corrupted the character of the people.” The large number of dikasts, who “were taken indiscriminately from all the classes, so that they included a large proportion of the lowest,” is dwelled upon, as well as “the kind of scene that would take place when such a mob has to decide important questions affecting the property and even lives of individuals.”<sup>21</sup>

The course of civil procedure seems to have been for

<sup>20</sup> Grote's *Greece*, c. XLVI.

<sup>21</sup> Forsyth's *Hortensius* (Am. ed.), c. II. pp. 30-31.

the plaintiff to call upon a magistrate who had jurisdiction of the subject-matter or cause of action involved, and to procure a summons for the appearance of the defendant, which the latter had usually to make within five days. Then a preliminary hearing occurred, in order to determine whether the plaintiff could make out a *prima facie* case, and on an adjourned day the depositions of both parties, their witnesses and other proofs were submitted to him, not that he might pass thereon, but in order to preserve them for the trial before a dikastery; for the latter heard no evidence that had not been submitted to the magistrate in the preliminary proceeding, although it might and often did require witnesses to appear in person, to certify (under dikasterial scrutiny) to the truth of the depositions theretofore made. The verdict was given by each dikast depositing in one of two urns a bean, pebble, or brass ball, indicative of his verdict."

There was thus a proceeding *in jure* and one *in judicio*, akin to what we shall note hereafter in Roman jurisprudence, but divested of the technical details that characterized the latter."

"The Athenians, a people versatile in character and gifted with extraordinary quickness of intellect, delighted in the excitement of forensic contests, but this was not the only attraction which rendered the office of a dikast or juror acceptable to them. Pericles introduced the custom of paying each of them for his attendance, and the demagogue Cleon, whose great object was to ingratiate himself with the populace, trebled the

<sup>22</sup> *Id.*, pp. 33-34.

<sup>23</sup> *cf. post*, chap. III.

amount . . . so that the exercise of their judicial functions became, to a large number of the citizens, a means of livelihood as well as of amusement." <sup>24</sup>

Accordingly Socrates complains that the lower orders of the state, rather than enter the maritime service of the same, prefer to stay at home and sit as dikasts, and breathe the fulsome incense of adulation, in which the sophists and other orators indulged, and which pretended to exalt the humble dikast to the rank of a demigod. "And a god in some sense he was; for to no earthly tribunal lay there an appeal from him; his person was irresponsible, his decrees irreversible; and if ever there was a despotism complete in itself, 'pure, unsophisticated, dephlegmated, defalcated' despotism, it was that of an Athenian court of judicature." <sup>25</sup>

And Aristophanes (in his "Wasps") depicts an amiable old gentleman, Philocleon, who "cannot sleep for thinking of the bench. . . . There, with his staff in his hand, and his judicial cloak on his shoulders, his delight is to sit all day earning his three obols, and having his ears tickled with the gross flattery by which litigant parties in Athens sought to conciliate the favor of the judges." The plot of the play turns on the unremitting efforts of Bdelycleon to cure his sire of *dikastomania*.<sup>26</sup>

Again, in a small state like Athens, "where the jury on each trial bore no inconsiderable proportion to the whole number of citizens, many of these who sat as

<sup>24</sup> Hortensius, p. 25.

<sup>25</sup> *Id.*, p. 26.

<sup>26</sup> *Id.*, pp. 26-30. Philocleon gives an amusing account of his daily experiences, concluding:

"Tremblingly the father sues for grace and pardon then,  
As though I were a god to grant forgiveness unto men."

dikasts must have been cognizant beforehand of the facts of the case; and no doubt the verdict was often given, not upon the evidence adduced in court, but on the private information which they themselves possessed"—in this respect bearing a striking resemblance to the English jury in olden times."

In criminal trials, inasmuch as "the coffers of the state were replenished by the fines set upon those who were convicted, and a large portion of the money thus obtained was expended upon public shows and festivals"—a disposition having its counterpart, centuries later, in Rome with its *panes et circenses*—"the temptation to give an unfavorable verdict was almost irresistible, and small was the chance of escape if the accused happened to be wealthy!"

At all times were they, or many of them, "swayed by party feelings and private animosities," which not only influenced their verdict, but also the sentence that it was likewise their province to pronounce thereafter. Thus the proud reply of Socrates to the inquiry what sentence he deserved (according to Plato, in *Apologia Socratis*): "If I am to receive my deserts, I ought to have the highest honors paid me, and be entertained at the public expense in the Prytaneum," so exasperated the dikasts that they immediately condemned him to death." And so the wisest of the Greeks came to drink the cup of hemlock.

We have treated the dikastery thus extensively, because it is the first institution known to history which

<sup>27</sup> *Id.*, p. 38.

<sup>28</sup> *Vide* chap. IX.

<sup>29</sup> Hortensius, p. 27.

<sup>30</sup> *Id.*, pp. 31, 35, citing Cicero, de Orat. I. 54.

presents characteristic features of jury trial," and also because it was so important a factor in the development of Athenian politics.<sup>22</sup> It clearly possessed one essential

<sup>21</sup> "ὁ δικάστης — a judge, or rather a juror; at least the Athenian dikasts, like the Roman *judices*, came nearer the latter than the former, the presiding judge being 'ὁ κριτής.' Liddell & Scott, Greek Lexicon. The derivation of the name is from δίκη, right; but "as in early times right was thought to rest upon usage, the original signification of δίκη was custom, usage, manner or fashion," and the δικάσται hence were those who determined and declared this.

<sup>22</sup> Thus the dikasts, whose functions were called into action in criminal as well as civil causes, afford a marked instance of steadiness of purpose, power of discrimination, and fidelity to principle, in the trial of the accusation of Æschines against Ktesiphon—for illegally proposing and causing the senate to decree the honor of a public coronation for Demosthenes, in recognition of his patriotic services to the state,—on which occasion the orator delivered his famous oration *De Corona*. "It was manifest that Ktesiphon was but the nominal defendant; the real object of attack was Demosthenes, his whole policy and administration. . . . A jury (of not less than five hundred) was impanelled by the archon." Kennedy's *Demosthenes*, vol. II. p. 5.

It may be noticed that, under the Athenian law, this indictment was allowed to lie dormant for seven years by the prosecutor, the accused meanwhile making no effort to cause the former either to drop it or bring it on for trial, which finally took place 330 B. C. "The indictment now preferred by Æschines against Ktesiphon only procured for Demosthenes a new triumph. When the suffrages of the dikasts were counted, Æschines did not obtain as much as one fifth. He became liable, therefore, to the customary fine of 1000 drachmas," incurred under the standing regulation of Attic Law, rather than pay which he went into exile, whence he never returned. Grote's *Greece*, c. XCV.

Both as illustrative of the manner in which statutes were then drawn, and as affording an idea of the nature of the law whose passage was the cause of the indictment aforesaid, an extract from that stately document is subjoined (Kennedy, II. 49-50):

"In the archonship of Euthykles, on the twenty-second of Pyanepsion in the presidency of the Ceneian tribe, Ktesiphon son of Leosthenes of Anaphlyetus moved: Whereas Demosthenes son of Demosthenes of Pæania" has performed various meritorious acts of a public nature, which are duly enumerated, therefore "the council and people of Athens resolve to honor Demosthenes son of Demosthenes of Pæania, with public praise—and to crown him with a golden crown, and to proclaim the crown . . . at the Dionysian festival." For the terms of the indictment, see *Id.*, pp. 28-28.

element of the jury—selection of its members from the community at large; but on the other hand, would also seem to have exercised judicial functions. Still, its numerical strength seems to preclude it from being considered a court, which is a select and limited body; while it may plausibly be inferred to have been the function of the presiding magistrate to concentrate the minds of that numerous assemblage on the issue, to draw their attention to the legal points involved and rules of law applicable (which, however simple and non-technical, must have been subject to misconception or contrariety of opinion), to finally submit the question to their decision, and to declare and record the judgment or sentence in accordance with their verdict. If this view<sup>22</sup> be accepted, the quasi-judicial functions of the dikasts were simply incidental and subordinate to, however inseparably connected with, their duties as jurors.

<sup>22</sup> It seems to coincide with the opinion of Judge Cooley: "Before proceeding to hear any case, they [the dikasts] were sworn to discharge their duty faithfully. After hearing the case, they gave their votes by depositing them in urns or vases, from which the presiding [archon or other] magistrate took them and announced the verdict. In this there is much resemblance to the jury of our own day; the principal difference being in the large number who sat in each case." *Am. Cycl.* IX. 721.

## CHAPTER III.

### THE JUDICES OF ROME.

The judicial procedure of Rome, though scientifically elaborated at an early date, and far more restricted by ceremonial forms and addicted to nice technicalities than that of the Greeks, "was, to a great extent, derived from and formed by that of Athens. We are accustomed to translate the word '*judex*' by 'judge,' but there was no officer or magistrate known to the Romans who discharged precisely the duties which with us belong to the judge; the prætor came nearest to it; but '*judex*' will be much better translated by the word 'jurymen.'"<sup>1</sup> This view coincides in a general way with that advanced long since by Dr. Pettingal,<sup>2</sup> who maintained that among the Romans the *judices* originally never signified judges or presidents of the court, but "a body of men quite distinct from the prætor or *judex questionis*,<sup>3</sup> who corresponded to our judge of the bench and was equivalent to the archon, ἡγεμῶν δικαστηρίων."

A brief historical and analytical study of Roman jurisprudence is requisite for the proper understanding of of the institution under consideration, aside from its instructiveness for the student of law generally.

<sup>1</sup> The term is derived from *jus* (right, law) and *dico* (I tell, declare)—the *judices*, therefore, being those who determined or laid down the right. This corresponds to the derivation of '*dikast*,' *ante*.

<sup>2</sup> Cooley, *Am. Cycl.* IX. art. *Jury*.

<sup>3</sup> *cf. ante*, p. 11.

<sup>4</sup> The magistrate last mentioned officiated at criminal trials only.—See *post*, page 37.

"In Rome," writes a modern German jurist of eminence\*, "the administration of justice between man and man constituted an attribute of sovereignty, and as such was exercised originally by the kings and subsequently by the consuls. The sharp demarcation between what we distinguish as executive and judicial functions was not a part of Roman civil polity." In course of time, it became customary for the consuls to delegate this civil jurisdiction to two prætors<sup>5</sup> as their peculiar sphere of utility, which designation, however, in nowise excluded the latter from participation in affairs of state, nor the other prætors—or the consuls—from the exercise of judicial authority. With the acquisition of new provinces, additional prætors were appointed to administer justice in each, so that at the fall of the republic their number was sixteen.

"It appears, moreover, as a very ancient institution, that the functions of the officiating [*rechts sprechenden*] magistrate did not comprise the complete control of the proceeding from first to last, but were limited to its initiation and orderly disposition; the proceeding, accordingly, did not terminate in a final decree or *sententia* [judgment], but in a *judicium* [verdict], which—depending on the direction of the magistrate as to what, and by whom, questions shall be adjudged—was a determination either by some standing tribunal or by (one or more) judices specially assigned. . . . Hence every lawsuit consisted of two successive divisions, the pro-

\* Von Keller, *Römischer Civil-Process* (5th ed.) § 1.

<sup>5</sup> These were respectively the *prætor urbanus* (*qui inter cives judicitt*), and the *prætor peregrinus* (*qui inter cives et peregrinos judicitt*). *Id.* § 2 (p. 6).

ceeding *in jure*' and that *in judicio* [the former being conducted before the magistrate, the latter before a private citizen acting as *judex* or arbiter]; which systematic partition constituted the so-called *ordo judiciorum privatorum* or the ordinary civil procedure."<sup>1</sup>

The permanent tribunals above referred to were the *Decemviri (litibus judicandis* or *Judices Xviri*) and the *Centumviri*.\* As 'judges' of the second class, the *Judices privati* proper, are mentioned *judices*, *arbitri* and *recuperatores*; of whom the former two (except at a very ancient period the *arbitri*) were never more numerous

<sup>1</sup> Every place where the court according to law and custom pronounces judgment, is termed *jus*; and what is there transacted by or before it, is done *in jure*. *Id.*, § 3, (p. 12).

\* Our authority then proceeds to state that various exceptions to this method of procedure were recognized in the course of time, chiefly in cases [*vide Id.* § 81] of trusts or *fidei commissa*, questions of manumission and emancipation, guardianship, funereal regulations and testamentary dispositions, and some others "wherein the court would conduct the proceeding from first to last without any *judicium*, and pronounce final judgment. This was the so-called *extraordinaria cognitio* or the procedure *extra ordinem*"—which term is also, in another and more comprehensive sense, applied to the court's jurisdiction in granting relief analogous to our 'Provisional Remedies.'

"These exceptions became more and more extended in the first centuries of the empire, till finally at the end of the third century the old system was wholly abrogated, the distinction between *jus* and *judicium* abolished, and the ordinary merged in the extraordinary procedure." *Röm. Civ. Proc.*, § 1 (pp. 5, 6).

\* Of the centumviral court (*Judices Cxviri*), Prof. Morey writes that, "although it seems to have existed from very early times down to the later empire, very little is definitely known. It was a permanent tribunal made up of over a hundred members (from 105 to 180) presided over by the prætor, and exercising the same kind of authority as that exercised by the *judices*. The causes that came under its cognizance were probably those more closely related to the old *jus civile*, as questions regarding Quiritarian ownership [as to which see *Id.*, pp. 74 and 283, ff], and certain questions relating to status and inheritance. The antiquity of this court is evident from the fact that a spear, the ancient symbol of ownership, continued (as Galus declares) to be set up in its place of meeting."—*Outlines Roman Law*, p. 390 (N. Y. 1884).

than one, while the last class always consisted of a larger number, for each case tried by them."

It is with the "*judex*" that we are more particularly concerned, and it may here be premised that the term varies in meaning at different periods of Roman history, besides designating a variety of 'triers' at any one period. In this connection an able American authority,<sup>10</sup> which succinctly embodies the results of the most recent researches, may be advantageously followed.

"An important feature of the judicial system of Rome during the time of the republic and the empire was the fact that the pronouncing of judgment was not, as a general thing, left to the magistrate, but to private persons invested by the magistrate with a judicial commission to try the case in hand. Such persons were generally called *judices*. They bore some resemblance to the English jurors in being chosen from the non-official class of citizens and in dealing more especially with the facts of the case. But in Rome there was generally one *judex* only, who was appointed in a civil case and to whom was left the whole investigation and decision, after the issue had been joined before the magistrate. The person to whom the case was referred was sometimes called an *arbiter*,<sup>11</sup> when a greater degree of latitude was al-

<sup>10</sup> Röm. Civ. Proc., § 4 (p. 20).

<sup>11</sup> Morey, Outl. Rom. Law, pp. 390, 391.

<sup>12</sup> "When the *judex* was directed to decide according to equity and good conscience, without strict reference to the instructions of the magistrate,"—*viz.* in actions *bonæ fidei* (as contradistinguished from the ordinary actions *stricti juris*), which were suits of a quasi-equitable character and adapted to the enforcement of obligations mutual or reciprocal in their nature—"he was called an *arbiter*." Pomeroy, Munic. Law, § 108.

These *arbitri* must not be confounded with arbitrators (*arbitri ex compromisso*), which, in our law, "are judges chosen by the parties to decide the matters submitted to them, finally and without appeal." Per *Grier, J.*, *Burchell v. March*, 58 U. S. 17 How. 344, 15 L. ed. 96.

lowed in pronouncing the sentence. When several persons were commissioned to decide a case, they were called *recuperatores*."<sup>13</sup> Hence (until the reign of Diocletian) there prevailed the distinction between those who exercised jurisdiction (*jus dicere*) and those who pronounced judgment (*judicium*)—which "proceeding *in judicio* was simply a private investigation, conducted by the person appointed as *judex* with a view to ascertain whether the claims of the plaintiff were well founded."<sup>14</sup> With the *judex* there was originally always—and subsequently, probably at the option of the prætor or the *judex*, upon the suggestion of the parties—joined a *consilium* of "assessors, who gave legal advice and assistance to those administering justice," as the intricacies of a case required."<sup>15</sup>

The form, development, and final extinction of the system of *judices*, in the progress of Roman jurisprudence, may be considered in three stages, and the same authority will be followed. "The most ancient mode of procedure . . . was the *actio sacramenti* . . . [which] represents a mock combat followed by a reference of the case to arbitration.

"The feigned quarrel was followed by the interference of the magistrate, who called out to both disputants to

<sup>13</sup> As to *Recuperatores*, cf. *post*, note 24.

<sup>14</sup> Morey, *Outl. Rom. Law*, 28.

<sup>15</sup> Thus Cicero delivered his oration *Pro Quintio*—in a suit which concerned a *sponsio prejudicialis* or bail bond—before a single *judex* assisted by a *consilium*.

So Aulus Gellius (*Noctes Atticæ*, XII. 13, refers to the addition of 'persons learned in the law' to the panel:

"*Denique ut tanto minus esset periculi ne imperiti judicarent, solebant aliquando is unus aut plures iudicis socii jurisperiti adfingi, quorum consilio omnia agerent.*"

let go their holds. . . . An altercation then ensued between the parties as to their respective titles, and each challenged the other to stake a sum of money upon the truth of his assertion. This stake was called *sacramentum*, from which the action took its name. . . . The sum forfeited did not go to the successful party, but to the public worship (*ad sacra publica*).

“The final step in the process was the reference of the disputed question to a private person, called the *judex*, or *arbiter*. The property in dispute was assigned to the temporary possession of one party, who gave surety to the other for its restoration in the event of his losing the suit”—herein resembling our action of replevin. “The *judex* simply decided as to which of the litigants was right in his claim. The part performed before the *judex* was called proceeding *in judicio*.

“The execution of the judgment formed no part of the *actio sacramenti*. Neither the magistrate nor the *judex* enforced the claims of the plaintiff.”<sup>16</sup> By the law of the XII Tables, “after the defendant had been condemned by the *judex* in a certain amount, he was allowed thirty days in which to satisfy the judgment. If he failed at the expiration of that time, he was liable to the *manus injectio*. That is, he was seized by the plaintiff and brought before the magistrate. If he could find no surety (*vindex*) his person was adjudged (*addictus*) to the plaintiff. He was thrown into chains and confined in the plaintiff’s house for sixty days, during which time the amount of his debt was proclaimed on three successive market days. On the third occasion, if he

<sup>16</sup> Morey, Outl. Rom. Law. pp. 17-19.

obtained no surety, he might be sold into slavery, or slain, and his body divided among his creditors."<sup>17</sup>

The ancient form of civil procedure (*legis actio*) was thus a judicial wager encouraged by the state to foster arbitration between litigants, and enabling the prevailing party to enforce the claims adjudged to him. It has been set forth at large in these pages, since, in the words of Sir Henry Sumner Maine, the *actio sacramenti* was "the undoubted parent of all the Roman actions, and consequently of most of the civil remedies now in use in the world."<sup>18</sup>

The second stage in the development of the *Judex* occurred, when the Formulary System, which dispensed with the legal fictions and symbolic forms of the early procedure, had been substituted for the *legis actiones*. The new system took its name from, and was based on, the *formula*, "which was a legal document drawn up by the prætor after hearing the claims of both parties, containing instructions [charges] to the *judex* as to the points at issue, and the mode of deciding the case according to the facts which should be proved. . . . The separation of questions of *law* from questions of *fact*, though not clearly defined in this proceeding, was yet involved in it. This distinction was undoubtedly an outgrowth from the ancient distinctions between proceedings *in jure* and [those] *in judicio*. With the decay of symbolism, the proceeding *in jure* was translated from a sacred and technical ceremony into a series of direc-

<sup>17</sup> *Id.*, p. 28, quoting: "On the third market day let him be cut into pieces; if any one cut too much or too little, it will not be a crime." Cf. an interesting note on the "Roman Law of Debtor and Creditor," in Grote's *Greece*, pt. II. app. to c. XI.

<sup>18</sup> Early Hist. of Institutions, p. 252.—"*Fictio*," says the same authority, "is properly a term of pleading, and signifies a false averment on the part of the plaintiff [e. g. Roman citizenship] which the defendant was not allowed to traverse." *Ancient Law*, c. II.

tions founded upon the legal aspect of the case, and setting forth the points at issue; while the proceeding *in judicio* came to be an elaborate and careful investigation of the facts in the case. In this way the formulary system, in its application to civil cases, brought into prominence one of the most essential features of the jury system."<sup>18</sup>

<sup>18</sup> Morey, *Outl. Rom. Law*, pp. 86, 87.

The author cites Ortolan to the effect that the formulary system was "nothing but an ingenious method of constituting and directing a jury in civil cases." The statement of the subject-matter of the controversy was termed the *demonstratio*; plaintiff's claim was contained in the *intentio*; the prætor's charge to the *judex*, in the *adjudicatio*, or (if pecuniary damages were demanded) in the *condemnatio*. The *exceptio* (which plaintiff might meet by a *replicatio*, to be met in turn by a *duplicatio*), presented the case from the standpoint of the defendant. The typical names for the parties in the formula were, respectively, *Aulus Agertus* and *Numerius Negidius*.

A general outline, under the formulary system, of the mode of procedure in a Roman lawsuit (*actio*)—by which plaintiff (*actor*) and defendant (*reus*) submit the issues of their case to a prætor or other public functionary—may here be advantageously appended:

"These magistrates possessed two kinds of jurisdiction, the one *ordinary*, the other *extraordinary*. In the former they were the sole judges of the law. "Actions were commenced before them; the parties made their allegations or pleadings which were reduced to writing; the issue was joined, or, in other words, the law and facts stated upon one side were denied on the other, and the cause was ready for trial. . . .

"This termination of the allegations of the parties, which the English and American procedure calls the joining of issue, the Roman lawyers denominated the *litis contestatio*. After the plaintiff and defendant had thus met in a definite issue, the next division of the formula was the adjudication, or sending the cause to the *judex* for decision upon the facts and final judgment [*judicium*]. . . .

"The magistrate at this point [*i. e.* issue joined] rendered his decision [*sententia*] upon the law (which was necessarily conditional in its character) defining the legal rule applicable to the case and showing how, if the facts should be established in one way or another, the judgment should be given. All this was done before the evidence was introduced to prove the facts. Here the judicial functions of the magistrate ended, and he transmitted the cause to a *judex*, agreed upon by the parties or appointed by himself, who heard the proofs, decided the facts, and gave a final judgment under the guidance of the rule of law laid down by the magistrate. The proceedings before him were similar to those before our juries; witnesses were examined, counsel argued, and a verdict was rendered." Pom., *Munic. Law*, §§ 106, 183; *vide* also Forsyth, c. III. § 1; Cooley, *Am. Cycl.* IX. 722.

We now proceed to the consideration of the third and final stage. The decay of republican institutions and the development of imperialism of necessity also affected powerfully the judicial arm of the government. "The formulary system of the republic was inconsistent with the spirit of the new government. The old system not only involved the separation of questions of law and questions of fact, but it admitted a body of non-professional citizens to a share in the administration of justice. This system had been continued in the early Empire in accordance with the general tendency to preserve the constitutional *forms* [while destroying inch by inch the inner *life*] of the republic. But the revolution of Diocletian and Constantine resulted in bringing the administration of justice entirely under the control of the emperor and the officers expressly appointed by him. This is seen both in the decay of the formulary system and in the duties of the *pedanei judices*.

"The formulary system was in harmony with the old republican idea that the functions of government should be exercised by the citizens, or by the magistrates chosen by citizens. . . . This whole procedure, involving the separation of *jus* and *judicium* and the exercise of judicial functions on the part of private citizens, was overthrown by Diocletian. The change not only grew out of the autocratic tendency of the new government; but was in part rendered necessary by the decay of the public spirit of the citizens, who avoided, as irksome, all share in public duties.

"Hitherto the magistrate might, in exceptional cases, assume the entire control of a case, and thus dispense with the service of a *judex*. It was by ordering the ex-

clusive use of this kind of procedure, which was called 'extraordinary,' that Diocletian abolished the formulary system which was involved in the 'ordinary' method of procedure. By a constitution of the emperor," all officers having jurisdiction were instructed to decide all questions—even those of fact which had previously been referred to the *judices*. Even the word '*judex*' was no longer used in the old sense, but was applied to the magistrate who exercised both *jus* and *judicium*.

"In order to relieve the provincial governors from an excess of judicial business, Diocletian granted to them the right to refer cases of minor importance to subordinate officers (*judices pedanei*)"—probably so termed, because sitting, as it were, *ad pedes*, at the feet of the governors. They "were not *judices* in the old sense of the word, but, according to the opinion of Ortolan, permanent magistrates entrusted with the special duty of conducting such cases as the governor might see fit to refer to them," and this without any separation into *jus* and *judicium*. "No other view of the character of these officers," our authority concludes, "seems consistent with the autocratic spirit which permeated the whole imperial system." "

The prevalence of the *judex* in Roman jurisprudence may thus be chronologically tabulated, in three epochs or stages:

I. From the adoption of the XII Tables" (450 B. C.) to the *lex Æbutia* and *leges Juliae* (passed about 100 B.

<sup>20</sup> And an edict of Constantine. See *post*, p. 41.

<sup>21</sup> Morey, *Outl. Rom. Law*, pp. 140-142.

<sup>22</sup> These "must be regarded as a compilation of the customary law of Rome, hitherto preserved and administered by the aristocratic or patrician class. . . . Our knowledge of the law previous to the formation of this code is, in great part, a matter of speculation." *Id.*, p. 25. cf. p. 43.

C. and 30 B. C. respectively, probably under Julius as well as Augustus Caesar). This may be designated as the formative period, in which the judicial wagers prevailed.

II. From the Laws mentioned—by which the introduction of the Formulary System was effected—to the reign of Diocletian (about 300 A. D). This is the period in which the *judicium* had its fullest sway and perfect development.

III. From Diocletian to the Justinian Code; which (533 A. D.) confirmed, and perpetuated for all countries whose jurisprudence is based on the civil law, the merger of the ordinary in the extraordinary jurisdiction of the magistrate, whereby the court decides both the law and the facts of a civil case.

It remains to consider the manner of selection of the *judex*. "The whole number of persons," says Cooley,<sup>33</sup> "from whom could be elected the *judices* of each case was as in Athens large, amounting to some thousands; but by whom and on what principle they were appointed, or how and by whom the smaller number was selected for each case, is not certainly known."<sup>34</sup> There was sometimes an agreement of the parties as to the *judex* or *judices*, and there was a method of objecting to *judices* appointed by lot or otherwise, which (*recusatio judicis*) answered very exactly to our challenges."

<sup>33</sup> Am. Cycl. IX. art. *Jury*.

<sup>34</sup> With regard to the *recuperatores*, "it is generally supposed that it was not necessary for them to be drawn from the usual judicial lists, from which the *judices* and the arbiters must be selected."—Morey, Outl. Rom. Law, p. 390.

They appear to have been selected by the prætor, after each party had rejected a certain number from the panel [thus bearing some resemblance to our "struck" jury].—Von Keller, Röm. Civ. Proc. § 9 (p. 44.)

Concerning the choice of *judices*, the same authority states that plaintiff had the right to suggest one from a limited number of persons as a

An eminent writer on the law of evidence<sup>25</sup> concludes that "the principal and characteristic circumstance in which the trial by a Roman differed from that of a modern jury, consisted in this—that in the former case neither the prætor, nor any other officer distinct from the jury, presided over the trial proper to determine as to the competency of witnesses, the admissibility of evidence, and to expound the law as connecting the facts with the allegations to be proved on the record."<sup>26</sup>

What has hereinbefore been stated has reference to civil suits only. However, the analogy<sup>27</sup> between our jurors and the *judices*, whose province it was in criminal trials to determine the question of guilt or innocence, is in many respects even stronger. While always more numerous than the corresponding body with us, there was never such an association of lawyers (*assessores*) with the panel, as was frequently the case with their civil juror. Another peculiarity they possessed was, that they could exercise the prerogative of mercy; just as our juries may commend a defendant whom they have tried and convicted to the mercy of the court.

The prosecution of crimes, in the early days of the republic, chiefly took place before the community at large, assembled in its various *comitia* or tribal assemblies. In certain cases, however, such as high treason (*crimen læsæ majestatis*) the senate early acquired and continued proper *judex* (*judicem ferre adversario*) which selection was formally confirmed by the prætor.

Under Augustus, a permanent register of jurors (*Album judicum selectorum*) was established.—*Id.* § 10.

<sup>25</sup> Starkie, *Ev.*, I. 5, note d.

<sup>26</sup> This defect seems, however, to some extent to have been remedied by associating a *constitum* of assessors with the jury.—*cf. ante*, page 29.

<sup>27</sup> *cf.* Forsyth, note to p. 46.

to exercise criminal jurisdiction. As the population increased and crimes multiplied, the prosecuting apparatus of the *comitia* was found cumbersome and impracticable, and accordingly "this inconvenient method of conducting criminal trials was superseded by the custom of making each particular case subject to a special trial (*questio*) which was conducted before a select body of *judices* under the direction of a quæstor, specially commissioned to preside in the given case.

"The custom of creating a special commission to try each case soon gave way to the organization of several permanent tribunals (*questiones perpetuæ*) each having jurisdiction over a certain class of crimes. Every criminal trial was thus conducted before a legal magistrate and a body of *judices*, or, in modern phrase, before a judge and jury. These two elements of the criminal court were distinct in character and functions. It was the duty of the magistrate, who was either a prætor or an officer called *judex questionis*, to conduct the trial according to the law which applied to the case. It was the duty of the jurors, who were private citizens selected for the occasion, to decide upon the guilt or innocence of the accused according to the evidence."<sup>28</sup>

That the ancient institution was not free from modern vices, like jury-fixing, is shown by a passage in Cicero's second Letter to Atticus: "*Hoc tempore Catilinam, competitorum nostrum, defendere cogitamus; judices habemus, quos volumus, summa accusatoris voluntate.*"<sup>29</sup>

<sup>28</sup> Morey, Outl. Rom. Law, pp. 87-88.

<sup>29</sup> Translation: At this time I am thinking of defending Catiline, my rival [for the consulship]; I have secured the jurors that I wanted, with the full consent of the prosecutor.—This was P. Clodius Pulcher, who had preferred against Catiline an accusation for extortion, alleged to

In Rome, as in Greece, the intervention of the jury was originally made use of only in state trials, since this was the means by which the jealous citizens of those democracies could guard against encroachments on the rights and liberty of the individual—the application of the principle to civil controversies following, by analogy, at a much later date. A brief survey of the successive Roman laws governing criminal prosecutions may hence not prove uninteresting—for the alternate admission and exclusion, and the ultimate recognition, of the commons as an element in this tribunal, vividly illustrate the struggle for supremacy between the classes composing the community of Rome, and in many respects constitute a historical prototype for the conflicts between crown and commons in England many centuries afterward.

For criminal trials other than capital, the first fixed court (*questio perpetua*) was established in the year 149 B. C. by the Lex Calpurnia *de repetundi*, which confined the selection of the *judices* to members of the senatorial order; the Lex Sempronia, however (129 B. C.) prescribed their selection from the knights (*equites*) alone. By the Lex Servilia it was (104 B. C.) enacted that accuser and accused should severally propose 100 *judices*, and that each might reject 50 from the list of the other, so that 100 would remain to try the alleged crime. Sulla (80 B. C.) restored the *judicium* to the senators, and established nine permanent courts for the trial of as many criminal offenses respectively. But the Lex

have been practiced while proprætor in Africa, 67 B. C. "Clodius, in fact, was bribed to give up the cause . . . and Torquatus taking his place, Catiline was acquitted *infamia judicium*." (Priehard & Bernard's Select Letters of Cicero, note at p. 100).

Aurelia (70 B. C.) vested it in the three orders jointly—senators, knights and Tribuni *Ærarii*—the last named (representatives of the plebs or commons) being the most respected plebeians, who acted as treasurers of the tribes and collected the arbitrary tax for the payment of the troops. The Lex *Judiciaria* of Cæsar abolished this third class, but that of Antony restored its functions and, moreover, removed the pecuniary qualification theretofore required, thus extending its membership to the centurions (or army officers) as representatives of the soldier element. Augustus added a fourth class—termed *Ducenarii*, who tried the trivial offenses—and Caligula a fifth, since by this time (analogous to our own experience) the *judicium* or jury duty had come to be regarded as a burden rather than a privilege, which each one sought to carry as little and lightly as possible.<sup>30</sup> And the Lex *Pompeia de ambitu* required that 80 *judices* be selected by lot for each criminal trial, of which

<sup>30</sup> The gradual growth, temporary authority, and final decadence of the power of the Roman *jux* are summarized by Gibbon as follows: "The task of convening the citizens for the trial of each offender became more difficult as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates, or to extraordinary inquisitors. . . . By these inquisitors the trial was prepared and directed; but they would only pronounce the sentence of the majority of judges, who with some truth have been compared to the English juries. To discharge this important though burdensome office, an annual list of ancient and respectable citizens was formed by the prætor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; 450 were appointed for single questions; and the various rolls or *decuriæ* of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause, a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant. . . .

In his civil jurisdiction, the prætor of the city was truly a judge, and

number the accuser and the accused might reject (challenge) 30 in all; thus, on the trial of Clodius, there were 56 *judices*. The method of voting was for the members of each class to deposit their votes in a separate urn, the result of each being taken separately and the whole added together, so that it was known how each class voted, though their individual votes remained unknown.

The Roman institution had some similarity with the Greek in the selection of its members, their standing and stated compensation, and differed from it—while agreeing with the modern body—in the full separation of law and fact, the existence of a dual process for their determination respectively, and in that the jurors had no direct influence on the judgment (*sententia*). The characteristic elements of our jury are: (1) the facts in a case are decided by individuals distinct and separate from the judge or magistrate, and (2) these individuals are chosen freely from the community of the citizens at large. “The Romans possessed the first of these features; the origin of the second is to be found in the tribal customs of the German peoples . . . who settled in Britain.”<sup>21</sup>

The Roman and the English method are well contrasted almost a legislator; but as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. . . . But whether he acted alone, or with the advice of his council, the most absolute powers might be trusted to a magistrate who was annually chosen by the votes of the people. The rules and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Diocletian, the *decuria* of Roman judges had sunk to an empty title; the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the Emperor.”—Decline and Fall of the Roman Empire, chap. 44.

<sup>21</sup> Pomeroy, Johns. Cycl. II. art. *Jury*.

ed by the American jurist just quoted." "With us there is one trial; the testimony is offered before judge and jury together; at its conclusion the court pronounces the law in the form of an oral charge, and the jury consider the facts in the light of the directions received from the bench. The Roman procedure required in fact two trials: At one the legal principle was discussed and decided by a magistrate, and reduced to a written form, which supplied the place of a charge; at the other the facts were determined, and a decision made, settling the rights of the parties, by a lay judge. The proceeding before the magistrate was said to be *in jure*; that before the judge was *in judicio*. It is thus evident that, by the Roman procedure, the questions of law and those of fact were even more completely separated in judicial trials than by our own. . . ."

"Thus the institution," continues the same authority, "existed for centuries, during the republic and under a portion of the emperors, the extraordinary power of the prætors constantly increasing and supplanting the ordinary, until, by an edict of the Emperor Constantius (A. D. 352), the latter was abolished, and the only method of trial became that in which all the questions" of law or of fact, similar to the power of equity judges or chancellors to-day, "were left to the same magistrate for decision. This practice was incorporated in the final codification of the Roman law under Justinian [A. D. 533], and has descended to us as one of its essential features, particularly distinguishing it from the common law of England. With the change made in the Roman jurisprudence by the imperial policy, the separation of

<sup>22</sup> *Id.*, Munic. Law, §§ 107, 109.

the questions of law and fact disappeared in European states, to re-appear centuries after, while the English jury trial was reaching, through many progressive stages, "its present well defined form."<sup>34</sup>

<sup>33</sup> *i. e.* The Compurgators, Sectatores, etc. (*post*, chap. VII,) the Recognitors (chap. VIII.) and the Assise (chap. IX.).

<sup>34</sup> Upon concluding this topic, we cannot refrain from appending an appreciative tribute to the Roman prætor from the pen of the late Prof. Pomeroy (Mun. Law, § 600) recognizing his rank as a potent factor in the progress of jurisprudence and a promoter of civilization. After alluding to the glory and grandeur of the Roman triumphators, he concludes with this singularly eloquent peroration:

"But the togæd prætor on his judgment seat was the exponent of a deeper, wider, more vital force; a force which penetrated beyond the reach of armies, and conquered when those armies were overthrown. He represented the Roman intellectual power, the genius for organization, the ideas of order, of civilization, of right and justice. He created jurisprudence which followed close upon the advancing limits of Empire, destroying old national systems, and making a people's subjugation complete. He has left a work whose effect on the world's civilization has far surpassed that of Greek philosophy and literature, or of Roman conquest. Indeed, his life is prolonged to our own times. The Roman empire has crumbled, the forum is deserted, but the Roman prætor has ascended the judicial tribunals of all modern nations. He sits by the side of the English chancellor; his spirit animates the decisions of British and American judges; he speaks with Holt, and Mansfield, and Stowell, with Kent, and Story. His influence will never cease while nations are impelled by sentiments of justice and equity, and their laws are formed upon a basis of practical morality."

## CHAPTER IV.

### THE TRIBUNALS OF THE ANCIENT GERMANS.<sup>1</sup>

We have seen that one essential feature of jury trial, the selection of the triers from the body of the community, originated or prevailed among the Teutons. On the other hand, "it is evident," to quote an American publicist,<sup>2</sup> "that this important element of the jury trial—the separation of the law from the fact, and the dual tribunal for their decision—was not borrowed from the Anglo-Saxon ancestors of the English nation. On the contrary, the German tribes . . . had not attained to the conception of any such refinement in the administration of justice. It was the very central principle of their primitive civil polity, that the decision of all private controversies . . . was committed to the collective freemen gathered together in their local assemblies.<sup>3</sup> This system of self-government was carried to an advanced degree of development by the Saxons in England."

The impression produced on the Romans by their contact with the ancient Germans, and the oldest ac-

<sup>1</sup> For a brief account of the old Scandinavian trial institution, see *post*, chap. VI., note 20.

<sup>2</sup> Pomeroy, *Johns. Cycl.* II., art. *Jury*.

<sup>3</sup> In the first chapter of his essay on *The Growth of the English Constitution*, Prof. Freeman presents an interesting account of the public assemblies of Uri and Appenzell, in whose deliberations every male adult citizen participates to the present day, and wherein "we may see the institutions of our own forefathers, the institutions which were once common to the whole Teutonic race, institutions whose outward form has necessarily passed away from greater states, but which contain the germs out of which every free constitution in the world has grown."

count of the institutions of the latter, are recorded by Tacitus in his immortal work *De Situ ac Populis Germaniæ*; and in the following passage therefrom, enthusiastic legal antiquaries have claimed to discover the germ of the jury, which reached its full development on British soil: "*Eliguntur in isdem conciliis et principes, qui jura per pagos vicosque reddunt, centeni singulis ex plebe comites, consilium simul et auctoritas, adsunt.*"<sup>4</sup>

So an old writer<sup>5</sup> on the jury states, that "traces of this mode of trial in Germany have been thought to be visible in the hundred co-assessors, mentioned by Tacitus as chosen out of the *Ingenui*, which the lord of a territory had when he sat in judgment. This number (says Mr. Carte<sup>6</sup>) prevailed undoubtedly among the Saxons, as in all the northern nations, till succeeding times gave occasion to some alternations."

It would seem, however, as if the writer confounded with this juridical institution the political and territorial division of the Hundred—which, indeed, prevailed among the various Germanic nations and was restored in England by King Alfred.<sup>7</sup>

It is, however, clear from recent investigations that this view must, if adopted at all, be taken with much

<sup>4</sup> Tac. Germ. XII. Freeman's transl. Eng. Const., c. I.

"In the same assembly chiefs are chosen to administer justice through the districts and villages. Each chief in so doing has a hundred companions of the commons assigned to him, as at once his counsellors and his authority."

<sup>5</sup> In Rees' Cycl. vol. XX., tit. *Jury*.

<sup>6</sup> A writer on English history whose work is mainly valuable as a storehouse of historical data; published 1744-1755.

<sup>7</sup> See *post*, chap. VII. So Maine (*Early Law and Customs*, 144) speaks of "the oldest and most nearly universal of the organized Teutonic courts, the court of the hundred," in which the Salic Law was the manual "for the use of the free judges."

qualification. Waitz, in his Constitutional History of Germany,\* elaborately discusses the question, and his commentary on the passage quoted may be thus summarized: the heads of each district (*principes*) chosen in the popular assembly of the tribe (*in conciliis*) did not themselves pronounce judgment, but arranged and supervised the session of the court by summoning the "judges," causing the attendance of the parties and their witnesses, and seeing to the execution of the verdict or judgment; but it was the *centeni* or hundred attendants, who found the decision (*consilium*) and gave it validity and force (*auctoritas*). The effect of all this is that, in number and in the primitive system of jurisprudence with which they had to deal, this institution strikingly resembled the Greek dikasteries, less distinctly the Roman *judices*, and thus remotely the modern English jury.

A corroboration of this view is furnished in this statement of Mr. Stubbs: "The primitive German courts were tribunals of fully qualified members of the community, a selection, it might be, from a body of equally competent companions, able to declare the law or custom of the country and to decide what, according to that custom, should be done in the particular case brought before them. They were not set to decide what was the truth of facts, but to determine what action was to be taken upon proof given . . . furnished by three means: the oaths of the parties . . . and their compurgators, the production of witnesses, and the use of the ordeal," practices which will be more fully con-

\* *Verfassungs-Geschichte*, vol. I. 154, 238, 333 ff.

† *Eng. Const. Hist.* c. XIII.

sidered when we come to the consideration of Anglo-Saxon jurisprudence.<sup>10</sup>

The whole topic is admirably discussed by Forsyth,<sup>11</sup> in various passages which we have collated from his history of Trial by Jury :

“The Germanic courts of justice in their earliest form . . . were composed of the freemen of the district, and presided over by the Graf or count (*comes*). All had a right to attend and take part in the judgment,” though in practice the attendance doubtless became limited to persons of peculiar ability and aptitude, whose opinion would tend to carry more weight than that of the average ‘citizen,’ until the latter began to feel his own superfluity and vacated the field. Before this, however, the practice had arisen for the president to select certain freemen (usually seven, and never less than three) to act with him when holding court. These among the Franks were called *Rachin-burgen*, among the Lombards *Arimannen*, both being designated in old records by the Latin equivalent of *boni homines*. This segregation naturally but unintentionally produced a class of lawmen, so that “at a later period . . . we find judges duly appointed to the office and called *scabini* (*i. e.* *Schöffen* or ‘*Urtheiler*’),<sup>12</sup> who, however, did not at first exclude the freemen, but seem to have sat with them as joint members of the court. The chief difference between them was, that it was optional to the latter to

<sup>10</sup> Post, chaps. VI. and VII.

<sup>11</sup> Forsyth, c. III. § 1. *Id.* § 2. Cf. Savigny, Roem. Rechtsgesch. I. c. IV. art. 2.

<sup>12</sup> Consult Bronner on “*Schæffengerichte*” for further particulars.

attend or not . . . while the *scabini* were obliged to sit, by virtue of their office. This change seems to have been introduced by or about the time of Charlemagne," who ruled from 768 to 814, since in the capitularies<sup>18</sup> and edicts of that monarch the term "*scabini*" first occurs. "They were chosen by the presiding '*comes*' or '*missus*,' with the assent of the people generally; and the number required to form a court was seven . . . but on solemn and important occasions they were increased to twelve."

This presiding magistrate "had, however, no voice in the decision; and his duties, like those of the archon at Athens and prætor at Rome, were merely ministerial . . . The *scabini*, on the contrary, were both court and jury. They determined the question of innocence or guilt, or whatever fact might be in dispute, and they also awarded and pronounced the judgment . . . Usually the court itself, in convicting an offender, did no more than sentence him to undergo the ordeal, which gave him still a chance to escape; and amongst the old Saxons of the continent the judges (in number seven) might themselves be challenged to fight, by the culprit and six of his friends."

The explanation of the fact that an institution of the common ancestors of the English and Germans, at the start characterized by the selection of triers from the community at large, should flourish on English soil and ultimately develop into the jury, while falling into gradual desuetude in Germany and finally becoming obsolete, must be sought in the successive stimuli—above all, the Norman invasion—which affected it in Britain;

<sup>18</sup> Cf. *ante*, chap. I. p. 8. *Post*, chap. VIII.

while, on the other hand, its decay on the continent may be attributed to the gradual exclusion of the free-men (at first voluntary, but afterwards compulsory) from the ancient tribunal, and to the establishment of the institution of the *scabini* in Germany by Charlemagne. These were the sole judges of fact as well as law. They absorbed the whole judicial functions of the court, and, therefore, in the opinion of our authority,<sup>14</sup> "there was no room for another body distinct from them, whose office should be conclusively to determine questions of fact for them. And when the principle was once established of thus making the court consist entirely of a limited number of duly qualified judges, the transition . . . to single judges . . . who decided without the intervention of a jury, was a natural and almost necessary consequence."<sup>15</sup>

<sup>14</sup> Forsyth, *ante*.

<sup>15</sup> The advent and subsequent supremacy of the *scabini* is suggestive of the creation of the *judices pedanei* following the disestablishment of the *judex* proper, in Roman jurisprudence. Cf. *ante*, chap. III. p. 33, 34.

## CHAPTER V.

### THE INSTITUTIONS OF THE BRITONS.

"It is an important fact as regards the history of the spread of the Roman law in the west of Europe," observes Dr. Kaufmann in his preface to the first American edition of Mackeldey's *Modern Civil Law*,<sup>1</sup> that this law as it existed before Justinian, was introduced only into those countries which were converted into Roman provinces, as was the case with Great Britain. . . . Britain, as a Roman province, was placed under a governor with very extensive powers; so that the regulations introduced by him had necessarily a deep and lasting effect."

For a more perfect understanding of this influence and its consequences, as well as for a just conception of the ground on which the various factors that ultimately produced the jury had to operate, and of the successive stages of evolution through which it passed, it will be necessary to go to some extent into the early history of England; as well as to consider the various modes of trial which preceded, but were ultimately replaced by, or merged or found a substitute in, or were developed into, the trial by jury.

<sup>1</sup> Commenting on this work, Mr. Cooke, in the appendix to his *Treatise on Common and Civil Law in United States Jurisprudence*, says that its "learning and clear observation, as well as forcible illustration of the history and influence of the Civil Law in England, entitle it to a high place in the literature and philosophy of English jurisprudence."

The first inhabitants of Britain were a Gallic or Celtic race, who settled the island from the continent. Hume<sup>1</sup> informs us that "the southeast parts had already, before the age of Cæsar, made the first and most requisite step towards a civil settlement; and the Britons, by tillage and agriculture, had there increased to a great multitude. (Cæsar, lib. IV.) . . . The Druids,<sup>2</sup> who were their priests," performed also the duties of secular judges and had "great authority among them. . . . They possessed both civil and criminal jurisdiction; they decided all controversies among states,"—for the Britons were divided into a number of petty but querulous tribes, under limited monarchical governments,—“as well as among private persons, and whoever refused to submit to their decree was exposed to the most severe penalties.” Indeed, their influence was so deeply rooted, that the Romans found it impossible to substitute for the Druidical system their own laws, until they resorted to stringent penal enactments—with them an exceptional expedient.

Cæsar first invaded Britain in 55 B. C., and, during the century following, military expeditions to the island were made by various commanders. But it was left to

<sup>1</sup> Hist. of Eng. c. I.

<sup>2</sup> "The Druids," Palgrave writes, "were the priests of the Britons, and probably the lawgivers of the people. . . . Beyond a few particulars which have been preserved by Greek and Roman writers, we know little concerning their tenets. The doctrines of the Druids were not reduced into writing, but preserved by oral tradition; and when the Druidical priesthood was extinguished, their lore was lost." Hist. Anglo Saxons, c. I. pp. 4, 5.

Their tenets were usually communicated in the form of proverbial triads—each containing "three facts, precepts, or definitions." *Id.* note to p. 5.

Cf. Cæsar, *de bello Gallico*, § 1; also 6, 13, for the Druidical functions.

C. Julius Agricola to establish the supremacy of the Romans on a firm basis and bring order into chaos. When peace was restored, and the frontiers defended by forts against the inroads of the Caledonian tribes, the soldier-statesman "introduced laws and civility among the Britons" . . . reconciled them to the Roman language and manners, instructed them in letters and science, and employed every expedient to render those chains which he had forged both easy and agreeable to them (Tacitus' Agricola). The inhabitants . . . were gradually incorporated as a part of that mighty Empire . . . and during the reign of all the Roman emperors such a profound tranquillity prevailed in Britain that little mention is made of the affairs of that island by any historian. . . . The natives, disarmed, dispirited and submissive, had lost all desire, and even idea, of their former liberty and independence." \*

To such an extent, then, was the Roman dominion established in the island, and the sway of Roman institutions acknowledged, that the latter had virtually become British institutions and "the law of the land." \*

\* "As soon as Rome conquered a province, it introduced at once the provisions and the forms (*jura et instituta*) of its own law, because the province might be thus most effectually bound to the empire, and also because they were always better than those of the conquered nation; and as we know therefore that institutions, which resembled in so many particulars our jury, were in full force in England for more than three centuries, it would seem unreasonable to deny them an important influence in creating the trial by jury." Cooley, Am. Cycl. IX. 722.

\* Hume's England, c. I.

\* Prof. Fowler, in treating of The Development of the English Language, summarizes the Roman Conquest as follows: "Urged on by curiosity and ambition, Julius Cæsar invaded Britain in the year 55 B. C. Though the Britons met him even in the waves with a determined resistance, yet their impetuous valor could not withstand Roman discipline.

Accordingly it is not surprising to read' that "we are not to look upon the civil law altogether as a foreign commodity, with respect to England; some of the particular laws thereof having been enacted for deciding controversies which arose here in England, and bearing date from this country. The greatest part of this island was governed wholly by the civil law, for the space of about three hundred years, to wit: from the reign of the Emperor Claudius to that of Honorius [A. D. 41-395]; during which time some of the most eminent among the Roman lawyers, as Papinian, Paulus, and Ulpian, whose opinions are collected in the body of the civil law, sat in the seat of judgment, here in England, and distributed justice to the inhabitants." And the law thus administered was embodied in Justinian's Code.\*

But during these centuries the mighty empire was decaying and gradually nearing dissolution, and the time

And in subsequent years, though they fought for independence under the brave Caractacus and the heroine Boadicea, the Roman legions still triumphed. Agricola completed the conquest of the island. Pursuing a liberal policy, he seems to have directed all the energies of his mind to civilize and improve the fierce natives. He assisted them to build temples; he inspired them with a love of education; and he persuaded some of their chiefs to study letters. Roman dress and language and literature spread among the natives. Roman law and magistracies were everywhere established, and British lawyers as well as British ladies have obtained the panegyrics of the Roman classics." Eng. Gram. § 63.

\* Strahan, preface to Domat's Civil Law.

§ With the rise of the Italian universities and the consequent revival of learning at the close of the 11th century, the study of the civil law was resumed with zeal on the continent, and the English clergy (not to be outdone by its continental brethren) caused Vacarius to lecture thereon at the University of Oxford. Two parties were formed—a clerical one as promoters of the civil, and a laical party upholding the common law. The latter, in 1152, prevailed upon King Stephen to issue a proclamation "forbidding the study of the laws then newly imported from Italy," and, says Kent, "the rivalry and even hostility, which soon afterwards arose between the civil and common law, between the

came when it could no longer spare an army contingent for distant Britain, but must concentrate all its power in the ancient capital, to prevent its overthrow by the aggressive barbarians. Accordingly, about the year 448, during the patricianship of Ætius, the last Roman legion was withdrawn, and with it Roman authority and government abandoned the island forever—"notwithstanding the entreaties of the inhabitants, who were hard pressed by the Picts and Scots, so that in the end they were obliged to call in the assistance of the Angles and Saxons."

At the present time, the effect of the Roman occupation can alone be traced in the privileges of municipal

clergy and laity, tended to check that system in England, and to confine its influence to those courts which were under the more immediate superintendence of the clergy." Com. pt. III. chap. XXIII. See also Reeves, vol. I. p. 68; Cooley's Bl. Com. Intro. § 1, p. 19.

Again, "when the clergy attempted to establish as a law the *legitimatio per subsequens matrimonium*, which . . . was a purely canonical institution,"—legitimizing a child, born out of lawful wedlock, by the subsequent valid marriage of its parents—"the nobility rose as one man and protested . . . in the memorable words '*nolumus leges Anglicas mutari, quas hucusque usitatas sunt et approbatas*' . . . and thus the dispute was decided in favor of the common law." Cocke, Com. & Civ. Law in U. S. pp. 232, 233.

The very championship of the civil law on part of the clergy became a ground of objection to it with the popular party, which seemed apprehensive of the establishment of an *impertum in imperto*.

\* Schmitz, Man. Ancient Hist. c. XX. § 6.

In commenting on the changes wrought by the decadence of the Roman empire in its provincial dependencies, this writer remarks: "The countries which Rome had ruled over during the previous five hundred years, and even Italy itself, had been invaded and conquered by barbarians of the Teutonic race, who established in Britain, Gaul, Spain, the south of Germany, Italy, and the north of Africa new and independent kingdoms, and laid the foundations of an entirely new state of things. . . . They could not destroy everything, for it is a law of history that, wherever a barbarous nation conquers a civilized people and rules over it, the barbarians gradually adopt the civilization of the conquered, and become absorbed by them."

corporations" and in the existence of the Christian religion, which Roman intercourse with the Britons had established. The inquiry, therefore, is patent: What has caused the *jura et instituta*, fostered and cultivated in Britain for several centuries, so generally to vanish, as to baffle the searching scrutiny of legal antiquaries and, almost,

"Like the baseless fabric of a dream,  
Leave not a rack behind?"

The solution of this problem must be sought in the condition of the Britons themselves, in the character of their Saxon subjugators, and in their subsequent persecution and annihilation, as illustrated by the history of those times. When the Britons, characterized as "a people so long disused to arms [that they] had not yet acquired any union among themselves, and were destitute of all affection to their new liberties, and of all national attachments and regards,"<sup>10</sup> were left by the Romans to shift for themselves and threatened with an invasion by the Picts and Scots, Vortigern (within a year after the final departure of the Romans) felt compelled to summon aid from the continent.

<sup>10</sup> "Though the rapid progress in civilization, which the Britons had begun to make under the Roman government was interrupted by the Saxons, some of its effects are yet visible at the present day. Municipal institutions with their privileges, which constitute the foundation of political freedom, owe their establishment in Great Britain, as well as throughout Europe, to the Romans." Dr. Kaufmann's note to Macket-dey's Civ. Law.

And at the present day, remarks Chancellor Kent, "it exerts a very considerable influence upon our own municipal law and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate's or consistorial courts."

<sup>11</sup> Kent, Com. 515; cf. *post*, note 15, and chap. VIII. note 1.

<sup>11</sup> Hume's England, c. I.

“ . . . Not sparkling ardent flame,  
As when Caractacus to battle led  
Silurian swains, and Boardicea taught  
Her raging troops the miseries of slaves.  
Then, sad relief, from the bleak coast that hears  
The German Ocean roar, deep-blooming, strong,  
And yellow-haired, the blue-eyed Saxon came.”<sup>13</sup>

The valiant but barbaric German tribes from allies soon became masters. Reinforced from time to time by swarms of their brethren from the continent, the Angles and Saxons waged a war of extermination against the Britons, who, with the valor of desperation, resisted with something like their ancient vigor. But the superior strength and experience of the invaders triumphed; the few natives who were not killed were forced to seek refuge among the inaccessible fastnesses of Cornwall and Wales, and thus, writes Hume,<sup>14</sup> “was established, after a violent contest of near a hundred and fifty years, the Heptarchy, or seven Saxon Kingdoms in Britain; and the whole southern part of the island, except Wales and Cornwall, had totally changed its inhabitants, language, customs, and political institutions. The Britons, under the Roman dominion, had made such advances towards art and civil manners, that they built twenty-eight considerable cities within their province, besides a great number of villages and county seats. (Bede, lib. I.) But the fierce conquerors, by whom they were now subdued, threw everything back into ancient barbarity; and those few natives, who were not either massacred or expelled their habitations, were reduced to the most abject slavery. . . . There

<sup>13</sup> Thomson's "Liberty," IV. 664-670.

<sup>14</sup> History of England, c. I.

have been found in history few conquests more ruinous than that of the Saxons,<sup>14</sup> and few revolutions more violent than that which they introduced."

Accordingly, in view of these data, it can no longer cause any surprise that so little remained to attest the prevalence of Roman civilization and laws;<sup>15</sup> and that,

<sup>14</sup> Cf. the statement of Dr. Kaufmann, in the preface aforesaid: "A hundred and fifty years after [the subjection of the Britons] we find that, in consequence of the continual wars, the inhabitants, language, customs, and political institutions of the country had become totally changed."

<sup>15</sup> At a period after the Norman Conquest, however, the Roman law was destined to be revived and become once more a potent factor in the administration of justice, by the learned ecclesiastical chancellors who had studied that law at its source and now engrafted many of its principles on the English stock, building up the so-called equity jurisdiction of the court of chancery, as a remedy for cases which the common law failed to reach, or—as Grotius has it—for the correction of that wherein the law, by reason of its universality, is deficient. "In this manner did the influence of the civil and canon law gradually increase. . . . They by degrees, gradually interwove themselves into the municipal law, and furnished it with helps towards improving its native stock. The law of personal property was in a great measure borrowed from the imperial, and the rules of the descent of lands wholly from the canon law." Reeves, *Hist. Eng. Law*, I. p. 81.

"Equity jurisprudence is nothing but the body of rules devised by enlightened chancellors during several centuries, for the purpose of evading the harsh and rigid rules of the common law, and for the protection of rights not recognized by it." R. Y. Hayne, *N. Am. Review*, v. 139, p. 849.

And, as late as 1704, when in the great case of *Coggs v. Bernard*, 2 *Ld. Raym.* 909, Lord Holt laid the foundation of the Law of Bailment, "he borrows most, perhaps all, of his principles from the civil law . . . with the modifications required to adapt them to the common law." Parsons, *Contracts*, c. XI. note a.

In speaking of the civil and canon law, Reeves further observes that they, as before them the Norman laws, "obtained here by sufferance and long usage. Such parts of them as were fitting and expedient, were quietly permitted to grow into practice; while such as were of an extravagant kind occasioned clamour, were called usurpations, and, as such, were strongly opposed. What was suffered to establish itself, either in the clerical courts, or by mingling with the secular customs, became so far part of the common law of the realm, equally with the

above all, the tender plant of trial by one's fellows, sheltered by the ante-Saxon inhabitants of England, should have withered and died (but not beyond resurrection) under the cruel touch of the northern barbarians.<sup>16</sup>

Norman; for though of later birth, it had gained its authority by the same title, a length of immemorial prescription." *Hist. Eng. Law*, vol. I. c. II. And see chap. VIII, note 8.

Maine (*Ancient Law*, c. I.) considers the "ascription of English law to immemorial unwritten tradition," and the "descent of Roman jurisprudence from a code [the Twelve Tables]" as equally "theoretical;" and moreover, expresses the belief "that remedial Equity is everywhere older than remedial Legislation." (*Id.* c. II.)

A recent writer concludes: "It may be safely asserted that at no time from the organization of Britain as a Roman province to the end of the Anglo-Norman period did the Roman law cease to be an important element of the legal institutions of England. The actual incorporation of the Roman law into the substance of the English common law is shown from the works of the early text-book writers. The revival of the scientific study of the civil law under Vacarius and his successors resulted in the desire to reduce the prevailing customs to a systematic form . . ." citing Spence to the effect that there is scarcely a principle of law incorporated in the treatise of Bracton that has survived to our own time, which may not be traced to the Roman law. Morey, *Outlines of Roman Law*, pp. 201, 202; *Id.* p. 190, concl. paragraph. And in *Lane v. Cotton*, 12 Mod. 482, "Lord Holt admitted that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law was borrowed from that system." Kent, *Com.*, pt. III, ed. XXIII.

While, as to the prevalence of the canon law, Blackstone observes: "At the dawn of the reformation, in the reign of King Henry VIII. it was enacted in parliament that a review should be had of the canon law; and, till such review should be made, all canons, constitutions, ordinances, and synodals provincial," then in force and not repugnant to the common law, "should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England." *Com.*, Intro. § III.

And this branch of our jurisprudence is applied without the co-operation of a jury.

<sup>16</sup> Burke, in his *History of Civilization in England* (vol. II. c. II. note 28) remarks that "there are few things in our history so irrational, as the admiration expressed by a certain class of writers for the institutions of our barbarous Anglo-Saxon ancestors;" and that to find the origin of jurors in the system of compurgators is as absurd as the action of tracing the origin of the House of Commons to the Witenagemot. "It is now well understood that trial by jury did not exist till long after the [Norman] Conquest."

## CHAPTER VI.

### THE SYSTEM OF THE ANGLO-SAXONS.

As regards the manner of men who now directed the destinies of England—for under that name (derived from the Angles) the island is henceforth known—and who indelibly impressed their characteristics upon it, and concerning their status in the scale of civilization, a graphic description is afforded us by the same historian. They “were little removed from the original state of nature ; the social confederacy among them was more martial than civil ; they had chiefly in view the means of attack and defense against public enemies, not those of protection against their fellow citizens ; their possessions were so slender and so equal that they were not exposed to great danger, and the natural bravery of the people made every man trust to himself and to his particular friends for his defense. . . . An insult upon any man was regarded by his relations and associates as a common injury ; they were bound by honor, as well as by a sense of common interest, to revenge his death or any violence which he had suffered ; they retaliated on the aggressor by like acts of violence ; and if he were protected, as was natural and usual, by his own clan, the quarrel was spread still wider and bred endless disorders in the nation.”<sup>1</sup>

Such, then, was the state of civilization which the Saxons enjoyed, and such the social and political structure which superseded the administration of the

<sup>1</sup> Hume's England, appendix I.

**Romans.** For almost four centuries the seven Anglo-Saxon kingdoms—true to the characteristics of their founders—present a history of uninterrupted warfare, bloodshed and internecine strife, though Christianity had meanwhile prevailed among them. Wessex, however, gradually acquired the hegemony, and in A. D. 827 its King Egbert succeeded in securing his acknowledgment as supreme head of the Heptarchy, with which event the history of the English nation properly begins.

Concerning their civil and social condition at this period, after a sojourn of four hundred years on English soil, it appears that "though they had been so long settled in the island [they] seem not as yet to have been much improved beyond their German ancestors, either in arts, civility, knowledge, humanity, justice, or obedience to the laws. . . . Bounty to the Church atoned for every violence against society." It cannot be doubted that, under ordinary circumstances, nationalization would have paved the way to improvements in the administration of justice, which, under the primitive system and the constant wars of the Saxons, had sadly degenerated. For, since "their language was everywhere nearly the same, their customs, laws, institutions, civil and religious . . . a union also in government opened to them the agreeable prospect of future tranquillity. . . . But these flattering views were soon overcast by the appearance of the Danes, who, during some centuries, kept the Anglo-Saxons in perpetual inquietude, committed the most barbarous ravages upon them, and at last reduced them to grievous servitude."

<sup>1</sup> *Id.* c. I.

<sup>2</sup> *Id.* c. II.

The first great land-mark in the history of English law is the reign of King Alfred (871-901) who, after he had restored peace, and either settled the Danes in or expelled them from the country, turned his attention to the administration of justice, which had become a mere name. His political and juridical institutions are recorded by Hume,<sup>4</sup> as follows: "That he might render the execution of justice strict and regular, he divided all England into counties; these counties he divided into hundreds, and the hundreds into tithings.<sup>5</sup> Every householder was answerable for the behavior of his family . . . . Ten neighboring householders were formed into one corporation, who, under the name of a tithing, decennary or fribourg, were answerable for each other's conduct, and over whom one person, called a tithingman, headbourg or borsholder, was appointed to preside. Every man was punished as an outlaw who did not register himself in some tithing.

"By this institution every man was obliged from his own interest to keep a watchful eye on the conduct of his neighbors; and was in a manner surety for the behavior of those who were placed under the division to which he belonged. Whence these decennaries received the name of frankpledges.<sup>6</sup> The borsholder sum-

<sup>4</sup> *Ibid.*

<sup>5</sup> In these assemblies not only judicial business, but all that affected the interests of the local communities which they represented, was transacted. Pomeroy, *Mun. Law*, § 383.

<sup>6</sup> The object of these small communities was, that each man should be in pledge or surety (*borh*), as well to his fellows as to the state. As each tithing was composed of a small number of members, neighbors to each other, it was possible that each individual should be under the constant and close scrutiny and espial of the rest of the association. Thus all the individuals united in a single tithing, were joined together by a bond of common interest and common fear; they were, in a

moned together the whole decennary to assist him in deciding any lesser difference which occurred among the members. In appeals from the decennary, or in controversies arising between members of different decennaries, the case was brought before the Hundred, which consisted of 10 decennaries or 100 families of freemen, and which was regularly assembled once in four weeks for the deciding of causes. (Leg. Edw. c. 2).

"Their method of decision deserves to be noted, as being"—at least in our historian's opinion—"the origin of juries. . . . Twelve freeholders were chosen, who, having sworn (together with the hundred or presiding magistrate of that division) to administer impartial justice, proceeded to the examination of that cause which was submitted to their jurisdiction. And besides these monthly meetings of the hundred, there was an annual meeting appointed . . . for the inquiry into crimes, the correction of abuses, and other matters of public concern.' If a further appeal were desired, or in controversies between members of different hundreds, the case was brought before the freeholders of the county (or shire)<sup>8</sup> over whom the bishop together

measure, isolated from the rest of the state; they were bound to present their fellow, if charged with an offense, before the court . . . they were to clear him of the charge, if possible, by oath, and to aid in paying his fine, if declared guilty; . . . they received a portion of the compensation for his death; they were his natural compurgators or witnesses." *Id.* § 401.

<sup>1</sup> cf. *post*, chap. X.

"The whole of the free male adults of a district might attend and form . . . the court for that district, yet it is by no means improbable that in practice this became limited to a smaller number." Forsyth, *Trial by Jury*, p. 66.

<sup>8</sup> The *scirgemot* or assembly of the shire bore the same relation to the latter, that the *Witenagemot* (or great assembly, *lit.*, meeting of the wise) bore to the realm. In New Jersey, the members of county boards

with the alderman presided.\* A final appeal lay to the king himself.

"Formerly the alderman" possessed both the civil and military authority; but Alfred . . . appointed also a sheriff" in each county, who enjoyed a co-ordinate authority with the former in his judicial (as distinguished from the military) function. His office also empowered him to guard the rights of the crown in the county, and to levy the fines imposed."

Such was the system established by Alfred, and

are still termed chosen freeholders. That its members (like those of our legislatures) were not at all remarkable for an exalted character is evidenced by the fact that "security was provided by the Saxon laws to all members of the Witenagemot, both in going and returning, *except they were notorious thieves and robbers.*" The consent of this body "was requisite for enacting laws and for ratifying the chief acts of public administration. The preambles to all the laws of Ethelbert, Ina, Alfred, Edward the Elder, Athelstane, Edmund, Edgar, Ethelred, and Edward the Confessor . . . put this matter beyond controversy." Hume's History, App. I.

In the opinion of Freeman (Eng. Const. c. II.) "The House of Lords . . . represents, or rather is, the ancient Witenagemot." cf. Gneist, Eng. Parliament, c. I. II. ante, chap. V. note 16.

"The folk-courts or gemots of the shires were composed of the assembled freemen, presided over by the eolderman or his deputy, the gerefa. In this institution . . . selecting the triers from among the . . . citizens at large had its origin." Pomeroy, Johns. Cycl. II. aft. Jury.

<sup>10</sup> It should be remembered that anciently the alderman (*Alt.* eolderman, *i. e.* an elder, presbyter) was a noble next in rank to the king, performing dual functions, and corresponding to the class subsequently designated as earls. He was governor of the shire, the sheriff (*scirgerefa*, *i. e.* shire-reeve) being his deputy. "The Teutonic chief who was not a king bore the title of ealdorman in peace and of Heretoga (*i. e.* duke, German *herzog*) in war." Freeman, Growth Eng. Const. c. I.

Contrasting with these ancient dignitaries those who to-day, in our cities, bear with much abuse "the grand old name of" Alderman, we may indeed exclaim: *Facilis descensus Averni!*

<sup>11</sup> The distinction between a sheriff (*vice-comes*) and a balliff (*ballivus*) was this—that the former might be elected, while the latter always owed his appointment to some superior.

adhered to by his successors as far as those turbulent times permitted. For its promotion and perpetuation, as well as for the guidance of the magistrates, on whom the duty to administer it was incumbent, the same king—according to our historical guide<sup>13</sup>—"framed a body of laws" which, though now lost, served long as the basis of English jurisprudence, and is generally deemed the origin of what is denominated the Common Law." While his judgment concerning the paternity of the system is, that "the similarity of these institutions to the customs of the ancient Germans," and to the Saxon laws during the heptarchy, prevents us from regarding Alfred as the sole author of this plan of government, and leads us rather to think that he contented himself with reforming, extending, and executing the institutions which he found previously established."

Thus far Hume, whose profound historical researches, combined with his early legal training, certainly entitle his opinion to much weight. But the existence, among the Saxons, of any institution resembling the jury has been hotly contested, and the dispute whether it was known to the Anglo-Saxons or introduced as a result of

<sup>13</sup> Hume's England, c. II.

<sup>13</sup> So Reeves writes (Hist. Eng. Law, vol. I. p. 25): "The great and good King Alfred, besides the regulations he made for the better order and government of his people, seeing how various the local customs of the kingdom were, made a collection of them; and out of them composed his *Dom Boc* or *Liber Judicalls*. It seems this was intended as a code for the government of his whole kingdom; and it obtained, with great authority, during several reigns; being referred to, in a law made by King Athelstan, as an authoritative guide."

<sup>14</sup> Alfred's territorial division corresponded with that recorded by Tacitus of the Germans, with whom each independent tribal territory (*civitas*) was divided into districts or hundreds (*pagos*), which, in turn, consisted of townships (*vicos*). Cf. *ante*, chap. IV.

the Norman Conquest, may be thus summarized : Coke (in his Institutes) Spelman (Glossarium Archæologicum) Blackstone (Com. III. c. 23) Nicholson (preface to Wilkin's Anglo-Saxon Laws) and Turner (Hist. Anglo-Saxons, IV. bk. XI. c. 9) ascribe it to Saxon paternity. On the other hand, Hickes (Dissert. Epist. p. 34) Reeves (Hist. Eng. Law, I. 22, 24) and Palgrave (Rise and Progress of Commonwealth, I. 243) claim with equal confidence that it was introduced by or at least derived from the Normans, and was not of Anglo-Saxon origin.

So Judge Cooley (Am. Cycl. IX. 722) approvingly observes that "so many of the attendant circumstances indicate that it was a Norman institution, bestowed upon his English subjects by a Norman king," that Sir Francis Palgrave has not hesitated to consider our jury trial as derived directly from Norman law ;" and Mr. Macclachlan (Eng. Cycl. III. 24) remarks : "Without entering minutely into this controversy, it may be stated that the traces of the trial by jury, in the form in which it existed for several centuries after the Conquest, are more distinctly discernible in the ancient customs of Normandy than in the few and scanty fragments of Anglo-Saxon law which have descended to our time."

<sup>18</sup> Glanville (lib. II. c. 7) terms it *regale quoddam beneficium*, "a certain royal benefit, conferred upon the people by the clemency of the sovereign with the advice of the nobility." *Vide* chap. IX.

Mr. Serjeant Stephen (Com. 3d ed. III. 500, note k) also considers it as the most probable theory that we owe the germ of this institution to the Normans; "and that it was derived by them from Scandinavia." (*Id.* 597, note z.) *Cf. post*, note 20.

The conclusion reached by Mr. Forsyth<sup>10</sup> affords perhaps the fairest statement of the case, and may be advantageously quoted in this place: "It may be confidently asserted that trial by jury was unknown to our Anglo-Saxon ancestors; and the idea of its existence in their legal system has arisen from a want of attention to the radical distinction between the members or judges composing a court, and a body of men set apart from that court, but summoned to attend in order to determine conclusively the facts of the case in dispute. This is the principle on which is founded the intervention of a jury; and no trace whatever can be found of such an institution in Anglo-Saxon times.

"If it has existed," he continues, "it is utterly unconceivable that distinct mention of it should not frequently have occurred in the body of Anglo-Saxon laws" and contemporary chronicles which we possess, extending from the time of Ethelbert (568-616) to the Norman Conquest (1066). Those who have fancied that they discover indications of its existence during that period,

<sup>10</sup> Trial by Jury, c. IV. § I.

<sup>11</sup> See *ante*, note 8, for a list of the names of the Anglo-Saxon kings, whose laws and ordinances (in a more or less defective state) have descended to our own time. The name of Canute might be added, for the sake of completeness.

In this connection Reeves observes (vol. I. p. 27): "The first of the Anglo-Saxon laws now in being are those of King Ethelbert. These are the most ancient laws in our realm, and are said to be the most ancient in modern Europe. The next are the laws of Lothaire and Eadric, and of Wihtried, all kings of Kent. Next are those of Ina, king of the West Saxons. After the Heptarchy we have the laws of Alfred, Edward the Elder, Athelstan, Edmund, Edgar, Ethelred and Canute. Besides these, there are canons and constitutions, decrees of councils, and other acts of a public nature." All these are in the Saxon language; and, in the time of Elizabeth, were collected by Lambard (and subsequently edited and increased by Wilkin) under the title '*Archæonomia; sive, de præcis Anglorum legibus.*' Nicholson's edition is the best and most complete.

have been misled by false analogies and inattention to the distinguishing features of the jury trial which have been previously pointed out. While, however, we assert that it was unknown in Saxon times, it is nevertheless true that we can recognize the traces of a system which paved the way for its introduction, and rendered its adaptation at a later period [the reign of Henry II.] neither unlikely nor abrupt. . . . Of the exact mode in which trials were conducted in these [ante-Norman] courts, we know little; but the Anglo-Saxon laws and contemporaneous annals make frequent mention of two classes of witnesses, who play a most important part in the judicial proceedings of the time." These are compurgators and official witnesses, who, together with other features of their system, will be more fully considered hereafter.<sup>18</sup>

With the demise of King Alfred, his system gradually lost ground. "During the reign of eight kings who succeeded Alfred," write Gilmans,<sup>19</sup> "the country suffered constant invasions from Denmark, which became so oppressive that in 991 the king, Ethelred II., agreed to pay the Danes 10,000 pounds, called Danegelt, to buy immunity. This sum was raised by a tax on land, the first one recorded in English history." Eleven years later the same king planned and partly executed a general massacre of foreigners in the island (Danemort) which led to a fierce attack from the Danes, to the expulsion of the king, and to the establishment of Sweyn as ruler of England. His son Canute married Ethelred's widow, a sister of the Duke of Normandy, in order, as

<sup>18</sup> See post, chap. VII.

<sup>19</sup> Outl. General Hist. p. 256.

it were, to legitimize his title, to strengthen his alliances, and to make secure the succession of his line.

When Canute, the Dane, mounted the English throne (1014) it might be supposed that he would transplant to, and incorporate in the system of, England the Danish quasi-jury or *Nævninger*—an institution common, with modifications, to all the Scandinavian nations<sup>30</sup>—which derived its appellation from the fact of being composed of a fixed number of men (usually 12) “named” by the inhabitants of each district; a ma-

<sup>30</sup> In this connection Reeves makes the following assertion (corresponding with that of Blackstone, Com. bk. III. c. 23): “The trial *per duodecim juratos*, called ‘*nambda*,’ had obtained among the Scandinavians at a very early period; but having gone into disuse, was revived and more firmly established by a law of Reignerus, surnamed Lodbrog, about the year A. D. 820. [In fact, he was king of Denmark between 750 and 790. cf. Freeman]. It was about seventy years after this law, that Rollo led his people into Normandy and, among other customs, carried with him this method of trial; it was used there in all causes that were of small importance. When the Normans had transplanted themselves into England, they were desirous of legitimating this, as they did other parts of their jurisprudence; and they endeavored to substitute it in the place of the Saxon *sectatores*, to which tribunal it bore some shew of affinity.” Hist. Eng. Law, c. II. p. 84. For the true genesis of the institution, see post, chap. VIII.

So the jurist in Rees' Cyclopaedia, vol. XX. observes: “Among the Danes the number [of jurors] was restrained to 12 in the time of Redner Ladebrog;” but further volunteers the remarkable information—“That this was the established number in Alfred's time, appears from his hanging Cadwine for sentencing a man to death, without the consent of the 12 jurors upon whom he had put himself to be tried.”

The facts concerning these Scandinavian institutions—according to the authorities cited *ante*, chap. I. note 19—may be summarized as follows: In these kingdoms there assembled annually, or might be summoned in extraordinary session, a national assembly for transacting public affairs, called a Thing. In Norway there was one for the north and one for the south; in Denmark, one for each district. In Norway thirty-six and in Sweden twelve of the deputies (summoned by the crown to attend the Thing) were set apart for the transaction of judicial business; in Denmark twelve were similarly chosen by the inhabitants of each district. The Norwegians were called *laugrettomen*, the Swedish body *nambda*, and the Danish *nævninger*. In the two former, a law-man originally

jority of those so chosen was competent to render a decision (subject to the ratification of the bishop and eight best men of the district) in civil suits; while in criminal cases, the accuser was obliged to convince the Nævn by sworn evidence of the truth of his charge, before the accused would be subjected to a public trial—this institution thus combining the functions of grand and petit jury with the exercise of judicial powers.

Canute, however, who was a lineal descendant of Alfred, and desirous of emulating that monarch, adopted a policy of conciliation towards the English. He had his succession to the throne ratified by a general assembly (Witenagemot) and publicly consented to restore and observe the Saxon customs and laws. In 1030, he addressed a letter "To all the Nations of the English"—under which designation he also meant to include the

presided. A majority sufficed to render a verdict upon a question of guilt or a disputed claim, after hearing the testimony thereon.

A critical scrutiny of the data laboriously collected by Prof. Repp seems amply to sustain Forsyth's conclusion that all these functionaries were "*judges* popularly constituted," and not "men summoned merely to determine *for the court* disputed questions of fact" upon evidence laid before them (Forsyth, p. 22) and whose verdict, anciently in England, "was nothing more than the conjoint testimony of a fixed number of persons deposing to facts within their own knowledge." (*Id.* 14.) In these early ages, questions of law and fact were generally so simple as to render their formal separation unnecessary. Granted certain facts, and certain legal consequences followed as a matter of course. So far as these functionaries, therefore, determined the facts of a case, they performed jural duties in the modern (not in the ancient English) sense, and so far as they applied the law, they acted judicially. [Like the free judges of Sir H. S. Maine, quoted *ante*, chap. IV. note 7.]

In any event, these institutions were not the archetype of our jury,—for the laws of the Angles, Saxons, and Jutes—who were neighbors and close kin to the Scandinavian nations—show no traces thereof; nor could they have been transplanted to England by the Normans, "and have become the common tribunals of the country, without leaving any record or trace of their existence until the reign of Henry II." (*Id.* 36.)

Danes, Swedes, and Norwegians—in which he said: “Be it known to you all, that I have dedicated my life to God, to govern my kingdom with justice, and to observe the right in all things.” That is, he refrained from making any essential innovations or alterations in the systems (political or judicial) to which his several dominions were accustomed, and in consequence Danish rule had no tangible formative effect on English jurisprudence.

The last of the Saxon line who ruled in England—chosen by the people when Sweyn’s family became extinct—was Edward the Confessor (1042–1066) whom Hume<sup>21</sup> deems commendable for “his attention to the administration of justice, and his compiling for that purpose a body of laws which he collected from the laws of Ethelbert, Ina, and Alfred. This compilation, though now lost (for the laws that pass under Edward’s name were composed afterwards<sup>22</sup>) was long the object of affection to the English nation.”<sup>23</sup>

<sup>21</sup> Hist. of England, c. III.

<sup>22</sup> Namely, “about the end of the reign of William Rufus; and are to be found in the collections of Lambard and Wilkin.” I Reeves, p. 27.

<sup>23</sup> “The grand design of making a complete code of English law fell to the part of Edward the Confessor; who is said to have collected from the Mercian, West Saxon, and Danish law an uniform body of law to be observed throughout the kingdom. From this circumstance, the character of an eminent legislator has been conferred on Edward the Confessor by posterity, who have endowed him with a sort of praise nearly allied to that of Alfred; for as one is dignified with the title of *legum Anglicanarum Conditor*, the other has been called *legum Anglicanarum Restitutor*.” *Id.*, vol. I. pp. 25, 26.

## CHAPTER VII.

### FORMS OF TRIAL AND TRIBUNALS AMONG THE SAXONS.

Having examined the social and political status of the Saxons in England, as evidenced by their history and environment, we may expect to find, on considering the judicial institutions, their personal characteristics reflected therein. Here, as there, we distinguish the same primitive system of administration, the same rudimentary ideas of right; the same regard for the efficacy of clerical absolution, the same adherence to old and meaningless forms, and the same reverence for the *vis major*.

The judicial system of the Anglo-Saxons<sup>1</sup> depended for its administration on, and consisted of, four distinct factors or elements: these were, *sectatores* or suitors of court, the *secta* or suit of witnesses, official witnesses, and compurgators. These have been generally confounded or at least not clearly distinguished, and the misconception of their proper functions has given rise to many ingenious theories. In general it may be said that of all these functionaries the first class only performed judicial duties; the second and the third were species of witnesses; the fourth officiated (at least originally) in criminal cases only, while none of them were jurors. A delineation of the functions of each will be given, and a distinction attempted.

<sup>1</sup> "That system was unaffected by the Conquest, and continued in all its vigor for many years after that event." Forsyth, c. V. § 1.

The name of *Sectatores* is applied by Forsyth to the limited number of freemen "who attended the hundred, county and manorial courts," to try offenses and determine disputes there; . . . and the obligation to attend was in the nature of a tenure, for neglect of which they might be distrained to appear." For, in accordance with the customs of those days, "to do suit at a county or other inferior court was . . . one of the common tenures by which land was held, and the suitors, called *sectatores*, or . . . at a later period *pares*," were therefore bound to give their attendance." Anciently their number appears to have depended on chance or convenience; nor do they appear to have acted always under the sanction of an oath; for to Reeves<sup>3</sup> "it seems that causes in the county and other courts were heard and determined by an indefinite number of persons called *sectatores*," of whom "the frequent mention," he continues, "is no proof of juries, properly so called, being known to our Saxon ancestors." It would seem that this form of judicial tribunal was the modified outcome of a feature of the elaborate county system established by Alfred,<sup>4</sup> and a result of the alterations necessitated and the encroachments caused by the incessant warfare prevalent after the death of that monarch,

<sup>3</sup> Trial by Jury, p. 66 and note. *Id.* p. 113.

<sup>3</sup> "This trial by an indefinite number of *sectatores* or suitors of court continued for many years after the Conquest; these are the persons meant by the terms *pares curiæ*, and *judicium partium*, so often found in the writings of this [Anglo-Norman] period." Reeves, *Hist. Eng. Law*, vol. I. p. 85. Cf. *post*, chap. XI. Sullivan (*Lect. on the Laws of Eng.*, ed. 1776, p. 248) says that "the hundred court . . . vanished in Edward the Third's reign."

<sup>4</sup> *Hist. Eng. Law* (2d ed. 1787) vol. I. p. 24.

<sup>5</sup> Cf. *ante*, chap. VI. pp. . . .

which must have greatly affected his system of government. The whole matter, however, is involved in much obscurity, and will be resumed, to some extent, in the chapter treating of the *Judicium Parium*.<sup>6</sup>

Concerning the second of the four classes, Prof. Robertson observes: "The trial *per sectam* . . . resembled in principle the system of compurgation. The plaintiff proved his case by vouching a certain number of witnesses (*secta*) who had seen the transaction in question, and the defendant rebutted the presumption thus created by vouching a larger number of witnesses on his own side." It was thus an application to civil suits of the principle, which governed the system of compurgation in relation to criminal causes. At a later period in Saxon history, however, it seems that compurgation was also extended to (and thus superseded the use of the *secta* in) . . . civil proceedings; or, at least, that the term "compurgation" was employed to designate both the criminal and the civil (*i. e.* the sectatory) method. Indeed, the very name of *secta* became an

<sup>6</sup> Post, chap. XI.

<sup>7</sup> Enc. Brit. XII, art. *Jury*. The same writer adds: "In course of time the practice arose of the witnesses of the *secta* telling their story to the jury, and with the increasing use of juries and the development of rules of evidence, this was gradually established as the true principle of the system."

According to Prof. Thayer ("The Older Modes of Trial," Harv. Law Rev. V. 48-51) the *secta* appertained to the proceedings preliminary to trial, and was required to show that the plaintiff had a case sufficient to put his adversary to proof. The latter might "stake his case on an examination of the complaint-witnesses," and prevailed if they disagreed; or he could join issue and proceed to trial regularly. Thus the *secta* was usually not examined, and later not even produced, and only the formula was preserved in the pleadings (in England) until 1852.

But in New Jersey all decorations still archaically conclude: *et inde producit sectam* ("and therefore he brings his suit, etc.")

alternative term for *sectatores*—the judges above described—which led to the confounding of the one with the other, and bred endless confusion and mistake.

At a more advanced period of the Anglo-Saxon dominion, when the defects of their mode of evidence and system of trial became perceptible even to their untutored minds, an attempt was made to partially remedy these defects by the official appointment in each district of sworn witnesses,\* whose duty it was to attest therein all sales, endowment of a woman *ad ostium ecclesiæ*, and the execution of charters. They were not subject to cross-examination, and their oath was decisive in case of dispute. Later, persons peculiarly qualified by circumstances (though not pre-appointed), were similarly sworn to prove age, ownership of chattels, and the death of one in whose estate dower was claimed.<sup>9</sup> Hence in the Year Books (16 Edw. II. 507, A. D. 1323) we read complaint that one “may name *ses cosyns et ses auns*, who by his procurement will decide against us.”

The most important of the four elements, and that destined to play the largest part in the development of trial by jury, was compurgation.<sup>10</sup> Under the Saxon system, in criminal cases the charge of the prosecutor or “accusor” sufficed to put the accused on his defense. This defense was by means of the process of compurgation, which was in vogue among the various Teutonic

\* Brunner, Schwurz, 54-58, 205.

<sup>9</sup> Hence, when the Conqueror transplanted the Norman trial by battle or duel to England, any one who might have been a fit, i. e. a sworn, witness for either party in a real action, could “hazard himself in a duel,” as a champion of the cause of his principal. See Forsyth, c. IV.

<sup>10</sup> Cf. Reeves, vol. I. p. 20. Many instances are set forth in 5 Haw. Law Rev. 58-63, showing that by the end of the 16th century it was obsolescent, and finally prevailed in actions of detinet and debt only.

nations (twelve being the usual number) and rested on the maxim: "*Nobilis homo ingenuus,—cum duodecim ingenuis se purget.*"<sup>11</sup> Compurgators may be defined as persons, who supported by their oaths the credibility of the party accused, pledging their belief in the latter's denial of the charge brought against him."<sup>12</sup>

"These were in no sense witnesses, for they might be wholly ignorant of the real facts in dispute; nor were they a jury, for no evidence was submitted to their consideration. They were merely friends of the party who summoned them; they knew his character, and by their united oaths they at once attested that character and their confidence in his truthfulness and the justice of his cause."<sup>13</sup>

This mode of trial was brought into England by the Saxons,<sup>14</sup> and Judge Cooley thus describes it: "Then the party accused—or, in later times, the party plaintiff or defendant—appeared with his friends, and they swore, he laying his hand on theirs and swearing with them, to

<sup>11</sup> *Vide* Rogge, *Gerichtswesen der Germanen*, c. 8.

<sup>12</sup> Contrast herewith the *Vorath*, *post*, chap. X. This appears to have been the incriminating body, composed of a number of freemen who happened to be cognizant of the facts of a particular case whereon they predicated their accusation, to meet which charge the defendant had resort to compurgation as aforesaid.

<sup>13</sup> *Pom.*, Johns. *Cycl.* II. art. *Jury*.

<sup>14</sup> "The trial by compurgators, under the name of *Wager of Law*, continued to be the law of England till abolished in 1833." *Eng. Cycl.* III. 26.

For a case wherein (as late as 1817) the tender of *wager of law* was held admissible, see *Chandler's Am. Law Reporter*, p. 265, and *note* (of *Chase's Bl.* 74, *note*). So in *King v. Williams*, 2 B. & C. 538, its legality was still (1824) reluctantly recognized in England. *Contra*, *Story, J., Stiglar v. Haywood*, 21 U. S. 8 *Wheat.* 675, 5 L. ed. 713.

*Starkie* (*Ev.* 76, *note h*) observes that the evidence to character, in criminal cases, is the last remnant of the process of compurgation now existent in English law.

It was abolished by Stat. 3 and 4 Wm. IV. c. 42.

the innocence of the accused, or to the claim or defence of the party. Little is certainly known either of the origin or of the extent, in point of time or of country, over which the trial by compurgators prevailed; but it must have had great influence over the subsequent forms of procedure. It fixed the number of the traverse [*i. e.* the petit or trial] jury at 12, that being the common number of compurgators . . . and this was a great improvement on the varying and sometimes very large number in Greece and Rome."<sup>15</sup>

Where the compurgators coincided in a favorable declaration, there was a complete acquittal. But if the accused was unable to present a sufficient number of these purgers; or, "if the party had been before accused of larceny or perjury, or had otherwise been rendered infamous and was thought not worthy of credit, —he was driven to make out his innocence by an appeal to heaven, in the trial by Ordeal,"<sup>16</sup> which was practiced either by the boiling water or the red-hot iron; the former being supplied to the common people, while the latter was reserved for the nobility.<sup>17</sup> The nature of this institution is so curious and interesting, and its peculiarities throw so much light on the character of that age, as to warrant a fuller consideration of this primitive predecessor and sometime competitor of our criminal jury.

If the accused was sentenced to undergo the ordeal by hot water, "he was to put his head into it or his whole arm, according to the degree of the offense: if it

<sup>15</sup> Am. Cyl. IX. art. *Jury*.

<sup>16</sup> Reeves, *Hist. Eng. Law*, vol. I. p. 20.

<sup>17</sup> See Hume's *England*, app. I. The maxim applied was: *Si super defendere non possit iudicio dei, scil aqua vel ferro, ferit de eo justitia.*

was by cold water, his thumbs were tied to his toes, and in this posture he was thrown into it. If he escaped unhurt by the boiling water (which might easily be contrived by the art of the priests), or if he sunk in the cold water, which would certainly happen, he was declared innocent. If he was hurt by the boiling water or swum in the cold, he was considered as guilty."<sup>18</sup>

Where a noble was called upon to subject himself to the ordeal by the hot iron, the hand of the accused—to quote the same authority—"was first sprinkled with holy water; then taking the iron in his hand he walked nine feet. The method of taking his steps was particularly and curiously appointed. At the end of the stated distance he threw down the iron and hastened to the altar; then his hand was bound up for three days, at the end of which time it was to be opened, and from the appearance of any hurt or not he was declared, in the former case, guilty, and in the latter, acquitted."<sup>19</sup>

Another instance may be quoted from the history of Hume. "When any controversy about a fact became too intricate for those ignorant judges"—the *sectatores* aforesaid—"to unravel, they had recourse to fortune; their methods of consulting this oracle were various. One of them was the decision by the cross. . . . When a person was accused of any crime, he first cleared himself by his oath, and he was attended by eleven compurgators. He next took two pieces of wood, one of which was marked with the sign of the cross, and, wrapping both up in wool, he placed them on the altar or on some celebrated relic. After some

<sup>18</sup> Reeves, *Hist. Eng. Law*, I. 21.

<sup>19</sup> *Ibid.*

prayers for the success of the experiment, a priest, or in his stead some inexperienced youth, took up one of the pieces of wood, and if he happened upon that which was marked with the figure of the cross, the person was pronounced innocent; if otherwise, guilty.””

It will be observed that it was the priests who had charge of administering these tests of innocence—termed *judicia dei*”—and they doubtless reaped a rich harvest from the monopoly of this privilege, commensurate with the wealth and the guilt of the accused. And there was still another species of this form of trial, which, as least likely to cause any harm, was generally employed by the clergy to purge themselves when one of their

<sup>30</sup> Hume's England, App. I.; cf. Reeves, I. 22.

<sup>31</sup> Ordeals prevailed only for about a century and a half after the Conquest, and seem to have been the *ultima ratio* where an accused was too old or disabled to venture on trial by battle, or “when compurgators or witnesses could not be found or were contradictory.” 5 Harv. Law Rev. 64, 65.

The whole system of procedure in criminal cases is well summarized by Prof. Pomeroy, as follows: “On the trial . . . no evidence, in any true sense of the term, was introduced; no attempt was made to examine the facts, or weigh the probabilities; the sole reliance was compurgation and the ordeal. In this also the rank of the accused modified the severity of the scrutiny. The oath of one noble was equivalent to that of six ceorls. If the culprit was a ceorl (churl), he must first call upon his lord to testify whether he had been guilty of crime before the present charge. When the result of this enquiry was favorable, the defendant could clear himself by simple compurgation or simple ordeal. By the first, the oaths of a proper number of his fellows must support his innocence; by the second, he plunged his hand into boiling water up to the wrist, or carried a hot iron in his naked palm nine paces. If these oaths were procured, or if the ordeal resulted in no serious injury, he was acquitted. When, however, the testimony of his lord marked him as a man of doubtful character, the compurgation was tripled in the number of oaths, and the ordeal in the severity of its infliction. If the result was unfavorable, the accused was condemned, and must redeem himself by the payment of the appointed fines to the state, and compensation to the injured party, or his relations or thythings.”—Mun. Law, § 409.

own members was accused of a crime, and which was called "The Corsnæd, or ordeal of the accursed morsel. This consisted in making the accused person swallow a piece of bread," placed on the altar with great ceremony and preparation, and "accompanied with a prayer that it might choke him if he was guilty. Godwin, the powerful Earl of Kent and father of Harold, was currently believed to have died in the act."<sup>22</sup> In confining this test of innocence almost exclusively to members of their own order, the priests seem to have thought that the old legal maxim should properly read "*Salus cleri suprema lex*," or, perhaps, they imagined themselves so exalted above the "common herd" as to harbor the idea *Quod licet Jovi, non licet bovi*. Such, then, were the *Judicia Dei*.<sup>23</sup>

Returning to the consideration of the civil procedure, to which compurgation appears at a later period to have been extended, we learn<sup>24</sup> that "the assertions of parties in their own favor were admitted as conclusive, provided they were supported by the oaths of a certain number of compurgators; in important cases the number was twelve, or . . . when added to the oath of the party himself, made up that number."<sup>25</sup> But even if the required number of purgers were produced by a

<sup>22</sup> Forsyth, *Trial by Jury*, c. IV. cf. 4 Bl. Com. c. XVII.; Reeves, I. 21, 22.

<sup>23</sup> "Besides the absurdity and implety of these presumptuous appeals to miraculous interposition, there can be little doubt that the danger of them was often evaded by management, so as to be more apparent than real." Best, *Ev.* § 42, note a.

For a curious exemplification thereof, from an old ecclesiastical source, see *Law Mag.* (N. S.) vol. I. p. 8.

As to the trial of witches by the ordeal, see some queer instances in Sir W. Scott's *Demonology and Witchcraft*, Letter VIII.

<sup>24</sup> Forsyth, c. IV. p. 32.

<sup>25</sup> As to this number, *vide* chap. VIII. note 26.

party, "his opponent might (in some cases, at all events) overpower the force of their testimony by calling compurgators on his side, whose oaths were of preponderating legal value. These, again, might be met by the accused in the same manner . . . until either party prevailed in the amount of legal value of the witnesses who supported them" . . . Sometimes the number of compurgators was so great as to form a large assembly."

Thus, in one case, it is recorded that a certain Ulnothus "*adduxit fideles viros plus quam mille, ut per juramentum illorum sibi vindicaret eandem terram.*"<sup>27</sup> A thousand witnesses to prove title to an estate!

The general rule of that day was, that witnesses were counted, not weighed. But, when the number was nearly evenly balanced, a very singular method for determining the superior legal value of the statements of the contestants was resorted to. A graduated scale of oaths prevailed, and legal credit was given them in accordance with the rank of the witness. The basis of estimation was the amount of wergild (also called man-bot), which was a compensation in money to be paid for personal injury<sup>28</sup> done to another, according to the value which the law set upon his life.<sup>29</sup> Thus the oath of a person

<sup>27</sup> "So, in the civil law, either of the litigant parties might in many cases tender an oath, called the 'decisory oath,' to the other; who was bound under peril of losing his cause, either to take it (in which case he obtained judgment without further trouble) or refer it back to his adversary, who then refused it at the like peril or took it with the like prospect of advantage." Best, Ev. §59.

<sup>28</sup> Hist. Eliens. I. 35.

<sup>29</sup> "The state did not regard the lives and persons of all individuals as of equal consequence, but annexed a different value to each, according to their status or rank in society." Pomeroy, Mun. Law, §403.

<sup>30</sup> If any further illustration of the influence of the Anglo-Saxon clergy, and of the abject awe they inspired, be needed, it will be found in the fact that "by the laws of Kent, the price of the archbishop's head was higher than that of the king's," the latter being about £1300. Hume's England, app. I.

worth 1200 shillings was equal to that of six churls, which was the term applied to an ordinary freeman,"<sup>20</sup> each of whom, however, was still considered as weighty as two Welshmen!<sup>21</sup>

Accordingly it causes little surprise, when, cognizant of the system, and conscious of this method of estimating the value of depositions, we read in Hallam that "perjury was the dominant crime of the middle ages; encouraged by the preposterous rules of compurgation and by the multiplicity of oaths in the ecclesiastical law."<sup>22</sup>

As referred to above, the points of resemblance between *sectatores*, compurgators and jurors have been the origin of many ingenious theories, maintaining that our modern jury was derived by a species of evolution from one or the other of these primitive boards of trial; while Turner, in his history of the Anglo-Saxons, fails to observe any distinction whatever between compurgators and jurors. This, concludes Forsyth,<sup>23</sup> is "entirely a mistake, founded on a misconception of the original nature of the office of jurymen. . . . Compurgation

<sup>20</sup> There were two classes of freemen—the nobles or earls and those not noble or churl. The unfree man or serf was termed a theow, and "was a mere chattel; he had no rights; could be transferred from one owner to another; had none of the privileges of freemen; was not, in fact, an element of the community or state." Pomeroy, *Mun. Law*, §375.

Nor could the churl become an earl, "for the simple reason that he could not change his forefathers; but he might, and often did, become a *thegn* [thane]."—Freeman, *Growth Eng. Const.*, c. I.

<sup>21</sup> Forsyth, pp. 73, 56. cf. Pomeroy, *Mun. Law*, §370.

<sup>22</sup> *Hist. Middle Ages*, Supp. Notes 280.

It was this prevalence of perjury, which is said to have led to the proceeding called an Attaint [as to which, see *post*, chap. IX.] for "it is related by the old writers that, during a considerable period after the Conquest, it was difficult to maintain the Saxon administration of justice in the county courts, by reason of the lapsed integrity of the freeholders, who were usually assembled in these courts as jurymen." Cooley, *Am. Cycl.* V. 152, art. *Common Law*.

<sup>23</sup> *Trial by Jury*, c. IV.

was one mode of trial; the jury was another. Each was distinct from the other, and both might and in fact did co-exist together," although, as experience taught men the immense advantage which the latter had over the former as a means of discovering the truth, trial by compurgators fell gradually into disuse." While an American authority of weight holds it to be "certain that all these influences" contributed to establish this mode of trial in England, and to shape it as we knew it to exist there. Indeed, it was not until all of them had had an opportunity of completing their work, that we find what we should now call a jury."<sup>24</sup>

We had, in the preceding chapter, traced a historical outline of the Anglo-Saxon or, rather, ante-Norman epoch, and have now completed the consideration of the various phases of its jurisprudence. It may, therefore, not be inappropriate, before taking final leave of this topic, to conclude with a graphic comment on the general status of the island and its inhabitants, at that period. Hume<sup>25</sup> observes: "Whatever we may imagine concerning the usual truth and sincerity of men who lived in a rude and barbarous state, there is much more falsehood and even perjury among them, than among civilized nations. Our European ancestors, who employed every moment the expedient of swearing on extraordinary crosses and relics, were less honorable in all engagements than their posterity. . . . The general proneness to perjury was much increased by the usual want of discernment in judges, who could not dis-

<sup>24</sup> Cf. *ante*, note 14.

<sup>25</sup> And that of the Norman recognitors—as to whom, see chap. IX.

<sup>26</sup> Cooley, *Am. Cycl.* IX. art. *Jury*.

<sup>27</sup> *Hist. of Eng.*, app. I.

cuss an intricate evidence, and were obliged to number, not weigh, the testimony of the witnesses. Hence the ridiculous practice of obliging men to bring compurgators, who, as they did not pretend to know anything of the fact, expressed upon oath<sup>38</sup> that they believed the person spoke true; and these compurgators were in some cases multiplied to the number of three hundred (Praf. Nicol. ad Wilkin, p. II.)<sup>39</sup> . . .

"They [the Anglo-Saxons] were in general a rude, uncultivated people, ignorant of letters, unskilled in mechanical arts, untamed to submission under law and government, addicted to intemperance, riot, and disorder. Their best quality was their military courage, which yet was not supported by discipline or conduct. Their want of fidelity to the prince, or to any trust reposed in them, appears strongly in the history of their later period, and their want of humanity in all their history. Even the Norman historians, notwithstanding the low state of the arts in their own country, speak of them as barbarians, when they mention the invasion made upon them by the Duke of Normandy (Gul. Pict. p. 202). The conquest put the people in a situation of receiving slowly, from abroad, the rudiments of science and cultivation, and of correcting their rough and licentious manners."

<sup>38</sup> As to the value of oaths in general, see Best, Ev. § 59, and the authorities there referred to in the notes.

As illustrative of the multiplicity of oaths pervading the administration of justice even at a more recent period, it has been well observed that "a pound of tea cannot travel regularly from the ship to the consumer, without costing half a dozen oaths at the least." Paley's Moral & Pol. Philos. bk. III. pt. I. c. 16.

And our own execrable tariff and tariff-administration laws render us to-day justly amenable to similar strictures.

<sup>39</sup> And even more; e. g. the case of Mister Ulnothus (*ante*, p. 83), who marched to court with more than a thousand men, to prove his claim.

## CHAPTER VIII.

### THE INSTITUTIONS OF THE NORMANS.

The accession of William the Norman (1066) constitutes the second great landmark in the history of English law, and inaugurates the epoch from which may be said to date the science of our jurisprudence. In the eloquent language of Judge Story,<sup>1</sup> "some of the most venerable sages of the law belong to this period; the methodical and almost classical Bracton; the neat and perspicuous Glanville; the exact and unknown author of *Fleta*; the criminal treatise of Britton; the ponderous collections of Statham, Fitzherbert, and Brooke; and, above all, the venerable Year Books themselves, the grand depositaries of the ancient common law, whence the Littletons and the Cokes, the Hobarts and the Hales, of later times, drew their precious and almost inexhaustible learning . . . This, too, was the age of scholastic refinements and metaphysical subtilities, and potent quibbles, and mysterious conceits;" when special

<sup>1</sup>Misc. Writings, p. 198, ff: On the Progress of Jurisprudence.

<sup>2</sup>So Blackstone speaks of "the ingenuity of the same ages, which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon." 2 Bl. Com., end of c. IV.

Among the master-spirits of these ages, Longfellow (in his essay on Dante)—after referring to Albertus Magnus, and Peter Lombard, "The Wise Master of Sentences," and "the Angelic Doctor, Thomas Aquinas"—mentions Raymond Lully, the *Doctor Illuminatus*, Francis of Mayence, the *Magister Acutus Abstractionum*, William Durand, the *Doctor Resolutionissimus*, Walter Burleigh, the *Doctor Planus et Perspicuus*, and William

pleading pored over its midnight lamp, and conjured up its phantoms to perplex, to bewilder, and sometimes to betray. This, too, was the age of strained and quaint argumentation, when the discussions of the bar were perilously acute and cunning. And yet, though much of the law of these times is grown obsolete, and the task of attempting a general revival of it hopeless, it cannot be denied that it abounds with treasures of knowledge. It affords the only sure foundation, in many cases, on which to build a solid fabric of argument; and no one ever explored its depths, rough and difficult as they are, without bringing back instruction fully proportioned to his labor."<sup>2</sup>

Occam, the *Doctor Invincibilis, Singularis, et Venerabilis*—"men of acute and masculine intellect."

There were, moreover, the *Doctor Solemnis*, the *Doctor Solidus*, the *Doctor Fundatissimus*, and last not least John Duns Scotus, the *Doctor Subtilis* and founder of "the Formalists, who taught that the end of philosophy is, to find out the quiddity of things—that every thing has a kind of quiddity or quidditive existence,—and that nothingness is divided into absolute nothingness, which has no quiddity or thingness, and relative nothingness, which has no existence out of the understanding."

<sup>2</sup> In connection with the note appended to chap. V. (p. 60)—concerning the influence of the civil on the common law—the high esteem with which the former was regarded by so eminent an authority as *Mr. Justice Story* may here be advantageously referred to.

In his eulogistic remarks on the occasion of the demise of Hugh S. Legaré, U. S. Attorney General, he observed: "I had indeed looked to him with great fondness of expectation. I had looked to see him accomplish what he was so well fitted to do,—what, I know, was the darling object of his pure ambition—to engraft the civil law upon the jurisprudence of this country, and thereby to expand the common law to greater usefulness and a wiser adaptation to the progress of society . . . by forcing into it the enlarged and liberal principles and just morality of the Roman jurisprudence." *Misc. Writings*, pp. 820, 822; cf. 1 Kent, Com. 515.

Dr. Irving (*Intro. to the Civil Law*) maintains that the influence of the civil law on the laws of England has been much greater than lawyers generally are aware. This coincides with the opinion of Spence and Holt, cited in the Note last referred to.

With the reign of William, the administration of justice becomes more regular and systematic; the study and propagation of law, more general; and the march of progress and improvement is steady, distinct, and more clearly discernible. It is, however, a mistake to suppose that the Conquest wrought any radical change<sup>4</sup>—such as the triumph of the Saxons made in the system of the Britons—nor should we allow the epithet of “The Conqueror” to mislead us. Conscious of his weak title, he pretended to claim the crown by virtue of the (suppositive) will of Edward, and strove to ingratiate himself with his new subjects—so far as the insolence and rapacity of his Norman retainers permitted—by allowing the English, in pursuance of the example erstwhile set by Canute, to continue in the enjoyment of their ancient customs and laws. The term “Conqueror,” according to the legal phraseology of that time, was simply intended to convey the idea that he had acquired the throne by purchase (his being a title by testament), and not by descent or, least of all, by the *jus belli*.<sup>5</sup>

The correctness of this view is further made manifest, and his policy of pacification corroborated, by the preamble to the laws promulgated in the reign of William:

“*Cez sont les lois è les custumes que li reis Will grant-ud al pople de Engleterre apres le cunquest de la terre; iciles meimes que li reis Edward, sun cusin, tint devant lui.*”<sup>6</sup>

<sup>4</sup> Cf. ante, chap. V., pp. 55-56; chap. VII. note 1.

<sup>5</sup> *Conquestus: id quod a parentibus non acceptum, sed labore pretio vel parsimonia comparatum possidemus. Hinc Guillelmus I. dicitur, qui Angliam conquestit (i. e. adquisitit “purchased;”) non quod subegit.* Spelman’s Glossary; cf. 2 Bl. Com. c. IV., Id. c. XV.

<sup>6</sup> TRANSLATION: These are the laws and customs which William the king granted to the people of England after the acquisition of that

"Accordingly," observes Forsyth,<sup>7</sup> "we find the distinguishing features of Anglo-Saxon jurisprudence retained by the Norman king . . . the wergild, or manbot, for bodily injuries; the system of mutual suretyship (*fridborh*, improperly rendered *frankpledge*);<sup>8</sup> the prohibition of suits before the king, unless there was first a failure of justice in the hundred, or county court; the necessity of purchases and sales being made in the presence of legal witnesses; and the use of compurgation and the ordeal."

The principal changes made by William the Acquirer were three in number:

1. The separation of spiritual and temporal courts. It suffices for our purpose to know that "William I. had separated the ecclesiastical jurisdiction from the civil by forbidding bishops to hold pleas in the county or hundred courts, and had limited their power to causes of a spiritual nature in their own tribunals"<sup>9</sup>—thus curtailing to a considerable extent the influence of the clergy upon, and their power of interference with, the judicial system. Still, however, ecclesiastics continued to officiate as judges in secular courts, until the year 1217; and, generally, as chancellors, until the period of the Reformation (1519).<sup>10</sup>

land: being the same [as those laws] which King Edward, his cousin, observed before him.—Thus "was the system of Saxon jurisprudence confirmed as the law of the country; and from thenceforth it continued the basis of the common law, upon which every subsequent alteration was to operate." Reeves, vol. I. p. 30.

<sup>7</sup> Trial by Jury, p. 86.

<sup>8</sup> Concerning these institutions, see *ante*, chap. VI. p. 47.

The Saxon term "*fridborh*" was, by the ancient jurists, erroneously rendered *liberum*, in place of *pactis*, *plegium*: which was anglicized into *frankpledge*, instead of "pledge of peace."

<sup>9</sup> Mackintosh, *Hist. of Eng.*, Cc. III.

<sup>10</sup> Cf. Kaufmann's note to Mackeldey's *Modern Civil Law* (app. to Cocks's *Common and Civil Law in U. S. Jurisprudence*, pp. 225-241).

2. The appointment of itinerant justiciars, later termed judges in eyre, who visited the different counties to administer justice in the king's name, and thus represented the *curia regis* throughout the realm, distinct from the hundred and county courts.

3. The introduction of the Norman trial by duel, as a means of determining (originally) the question of guilt or innocence in criminal, and (later) the facts at issue in civil cases. By this method, a party would offer to prove his side of the case by producing some person *qui hoc vidit vel audivit*,<sup>11</sup> and would hazard himself in duel for it, and the other party did the like; and judgment was entered in favor of that party whose champion prevailed, while the vanquished champion was severely punished for having borne false witness. This form of trial was, in the reign of Henry II. (1154-1189)<sup>12</sup> still "decisive in pleas concerning freehold; in writs of right; in warranty [*i. e.* guarantee]; in warranty of land, or of goods sold; debts upon mortgage or promise; sureties denying their suretyship; the validity of charters; the manumission of a villain; [and in] questions concerning services."<sup>13</sup>

<sup>11</sup> Cf. Glanville, *de Legibus et Consuetudinibus Regni Angliæ*; and see chap. IX. note 15, for the mode of procedure in trial by battle.

<sup>12</sup> This monarch is by some styled "the founder," and Edward I. (1272-1307) "the completer" of the common law, of which "it is almost impossible to discover the origin . . . or even to ascertain the times at which it received its various accessions. Reared on no fixed foundation, and constructed from the accumulations of successive ages, it has been constantly changing during its progress to completion." Prof. Kaufmann's note to Mackelvey's Civil Law. Common Law (as defined by Robinson, Elem. Law, 2, based on Austin) "is that rule of civil conduct which springs from the common wisdom and experience of society, in time becomes an established custom, and finally receives judicial sanction and affirmance in the courts of last resort." But see chap. V. note 15; chap. IX. note 2.

<sup>13</sup> Reeves, Hist. Eng. Law, c. II. p. 83.

Concerning this institution, introduced by the Normans, the comment of Hume<sup>14</sup> is of interest: "The practice also of single combat was employed by most nations on the continent as a remedy against false evidence; and though it was frequently dropped, from the opposition of the clergy, it was continually revived, from experience of the falsehood attending the testimony of witnesses. It became at last a species of jurisprudence; the cases were determined by law, in which the party might challenge his adversary, or the witnesses, or the judge himself."<sup>15</sup> And though these customs were absurd, they were rather an improvement on the methods of trial which had formerly been practiced among those barbarous nations, and which still prevailed among the Anglo-Saxons." Canon Stubbs, on the other hand, would have it regarded as "a sort of ultimate expedient to obtain a practical decision, an expedient partly akin to the ordeal as a judgment of God, and partly based on the idea that where legal measures had failed, recourse must be had to the primitive law of force."<sup>16</sup>

<sup>14</sup> Hist. Eng., app. I. Brunner (Schwurz. 189, 197-8) demonstrates its antiquity by reference to a capitulary of Louis the Pious, which (A. D. 819) prescribes that where two sets of witnesses flatly contradict each other, "*eligantur duo ex ipse . . . qui cum sentis et fustibus in campo decertent*," etc.

<sup>15</sup> Cf. ante, chap. IV. p. 47.

<sup>16</sup> Const. Hist. of Eng., c. XIII. p. 653. Prof. Thayer (5 Harv. Law Rev. 65-70) holds that the champion, who was practically "a complaint witness" [cf. chap. VII. note 7], was frequently hired for the occasion, and that resort to "the judicial battle" was had at odd intervals only. It was considered obsolete, until, to the amazement of mankind, in 1825 a "defendant escaped by means of this rusty weapon," and in 1819 it was adjudged (*Ashford v. Thornton*, 1 B. & A. 405) to be still "the constitutional mode of trial" in capital cases. Then, at last, Parliament abolished this legal spectre by 59 Geo. III. c. 48.

Inasmuch as upon such a test, the combatant of superior physique must ordinarily prevail, it naturally suggests the cynical maxim of Frederick the Great that the Almighty is on the side of the heavier battalions.

Besides this form of martial trial, however, which so well reflected the valor of its votaries (Reeves I. 83) there appear to have been used in Normandy and brought over on the Norman advent to the island, certain institutions used for the purpose of a quasi-judicial inquiry on the part of the crown, and from the example of which, by analogy, the later jury was immediately derived. Thus there are found existing in England, shortly after the Conquest, Inquisitions *ad quod damnum*, which anciently were connected with all grants by the crown;<sup>17</sup> Inquisitions *post mortem*, whose purpose was to ascertain, on the demise of a tenant of the king, of what lands he died seised; Inquisitions *de lunatico inquirendo*, instituted to test the mental sanity of a person; and Inquests of office, which occurred in cases where the interest of the crown was thought to be affected by some transaction between subject and subject: and these various inquiries were conducted through the agency of persons selected from the body of the community, in whose midst or in whose vicinage the transaction, which was the subject of investigation, occurred.<sup>18</sup>

<sup>17</sup> From the intimate connection of judicature with finance under the Norman Kings, Stubbs (Const. Hist. Eng. I. 385, 386) concludes "that it was mainly for the sake of the profits that justice was administered at all." The earliest use of the inquisition on English soil seems to have been in the compilation of the 'Doomsday Book' in 1085, '86, a record of local customs and of the tenure and taxable quality of land, "accomplished by a commission, making inquiry throughout England, by sworn men of each neighborhood, responsible and acquainted with the facts." 5 Harv. Law Rev. 252; citing Big., Plac. Anglo-Norm. XLIX. Palgr. Com. I. 271-273.

<sup>18</sup> Cf. Macclachlan, Eng. Cycl. III. art. *Jury*.

So these Inquests are spoken of by Stephen (in the eighth chapter of his monumental History of the Criminal Law of England) as "the usual mode of determining questions of fact" among the Normans. "An inquest was a body of persons representing a certain number of townships or other districts"—the township being represented by four *milites* and the reeve. They were convened by a justice, sheriff, or coroner, as representative of the crown, "and answered upon oath the particular matters proposed to them. They were wont to be selected for their knowledge of the facts of a particular case, which they might supplement by inquiry on the spot, or possibly by hearing evidence; for "it was by their oath, and not by the oath of their informants, that the fact to be proved was considered to be established." Inquests were first introduced in what were then "the commonest and most important of civil causes, namely, trials held in order to determine the right to land."

Brunner<sup>10</sup> has most exhaustively investigated this whole subject, showing that the *inquisitio*, "a procedure unknown to the old Germanic law," originated in "the capitularies and documents of the Carlovingian period," and that this Frankish law became a Norman institution after 912, when Rollo established himself in the territory subsequently Normandy.

These capitularies (so called because of their division into chapters, *capitula*) were promulgated by the kings, after consideration thereof in a general council or assembly, and are thus of mixed kingly and popular origin.

<sup>10</sup> *Schourzericht*, pp. 84, 88, 129-130, *et aliter*. See some reference to Capitularies, *ante*, chap. I. p. 1, chap. IV. p. 47. They have been collected by Baluze, in a compilation called *Capitularia Regum Francorum*.

The inquisition was, gradually, "applied both in legal controversy and in administration" and "no characteristic of it is that the judge summons a number of the community, selected by him as having presumably a knowledge of the facts in question, and takes of them a [sworn] promise to declare the truth on the questions to be put by him."

Thus in 829 A. D. it was provided that, in all matters concerning the royal revenues, "*per illos qui in eo comitatu meliores et veraciores esse cognoscuntur—per illorum testimonium inquisitio fiat.*" This, cogently observes a recent commentator, "is not merely ascertaining facts, it is determining controversy by a mode of 'trial;' taxes are laid, services exacted, personal status fixed, on the sworn answer of selected persons of a certain neighborhood. Such persons were likely to know who was in possession of neighboring land and by what title; they knew the *consuetudines* of the region, the free or servile status of the neighbors, their birth, death or marriage. An enlightened principle has now come in as regards revenues which was likely to extend and did extend to judicature, for that was only another part of royal administration."<sup>20</sup> It was the influence of the crown alone, which could compel parties to give up the time-honored formal procedure of the popular courts, to take an oath, and to produce their witnesses in the royal courts. By this institution, the king simplified, and largely obviated the barbarities or uncertainty of, the procedure theretofore prevalent, and is thus entitled to be called the great law-reformer of those times. The inquisition crossed the channel with the Normans, and

<sup>20</sup> Thayer, 5 Harv. Law Rev. 250. Cf. *ante*, note 17.

early in the thirteenth century, when John lost Aquitaine to the French, while "dying slowly out in France, began its peculiar astonishing development in England."<sup>21</sup>

In addition to these bodies of general inquiry (*inquisitoria jurata*) there also appear to have arisen, contemporaneously with the above, certain accusatory tribunals (*jurata delatoria*) "who presented offenses committed within their district or ward, hundred or county, to the king or his commissioned justices . . . their duty being to charge offenders who, upon such accusation, were put upon their trial before judges. . . . Though involved in much obscurity, there is little doubt that they formed the origin of our present grand juries."<sup>22</sup> There was no fixed number of members prescribed for either of these two classes of official inquirers, but the attendance vacillated, and was probably dependent on local usage or convenience; in most cases, however, the number was greater than twelve.

The introduction and establishment of these Inquisitions developed with but slight modification of the principle underlying their intervention, the innovation termed the Assise, whose history and progress will be more fully considered hereafter,<sup>23</sup> as being the immediate progenitor of the modern jury, and based on the customs of the Normans. For "in Normandy offenders were convicted or absolved," in cases where the trial by battle was inapplicable or impracticable or not customary,<sup>24</sup> or at times when it was interdicted by

<sup>21</sup> Thayer, 5 Harv. Law Rev. 261, citing Maine, Early Law and Customs, c. VI.

<sup>22</sup> *Ibid.* p. 24.

<sup>23</sup> Chapter IX.

<sup>24</sup> Cf. the statement of Prof. Stubbs, and of Reeves, *ante*.

the clergy," and in causes of small importance generally," "by an inquest of good and lawful men (*probi et legales homines*), summoned from the neighborhood where the offense was surmised to have been committed. . . . Those were to be selected to serve on such inquest, who were best informed of the truth of the matter; and friends, enemies, and near relations of the accused were to be excluded. . . . In the Norman Writ of Right, those were to be summoned as *recognitors*," for so these quasi-jurors were called, "who were born and had ever dwelt in the neighborhood where the land in question lay ('Grand Coustumier,' cap. 68, 69, 103);" for this mode of trial prevailed as well, under corresponding circumstances, in civil suits.

"The incidents," our authority" continues, "though unlike our present mode of trial (which has entirely altered its character within the last four centuries) are nearly identical with the trial by jury as described by Glanville and Bracton;" while, on the other hand, it conclusively appears, from a comparison of the laws and edicts issued by the king *before* the Conquest with the forms of law process presented by Granville, that they are as distinct from each other as the laws of two different nations." By virtue of the institution, thus presented as a substitute for the existing inefficient modes of trial, "the power and duty to decide in a particular case" was entrusted "to a limited number of freemen selected from the district, and this number was gener-

<sup>25</sup> Cf. Hume, quoted *ante*.

<sup>26</sup> See chap. VI, note 20, where Reeves traces the system of the Normans to their Scandinavian ancestors.

<sup>27</sup> Macolachlan, *supra*.

<sup>28</sup> Cf. Madox, *Hist. Exchequer*, p. 122.

ally twelve or some multiple of twelve." This delegated body," unlike the compurgators, "did not act without knowledge of the facts involved in the dispute," but such knowledge was not acquired by means of any evidence submitted to or predicated upon argument heard by them. "They decided entirely upon their own personal knowledge and information. In the selection of these persons, who were called recognitors, care was taken that they should be acquainted with the circumstances of the case, with the litigant parties, with the situation and ownership of the disputed property. They were, therefore, invariably chosen from the immediate vicinity of the parties or of the land in question. In doubtful cases they were strictly examined, to discover the amount and source of their knowledge. When appointed, they heard no evidence or allegations, but retired apart, and by comparing their previous in-

\* Twelve—"in which patriarchal and apostolical number" (says Blackstone bk. III. c. 23) "Sir Edward Coke [Co. Litt. 155] hath discovered abundance of mystery"—appears to have been a favorite number for constituting political and juridical bodies, with the various nations of the Teutonic group: thus there was a general council of the whole Old-Saxon nation, formed of twelve chosen men from each district. Freeman, *Growth of Eng. Const.* c. I. note 41; cf. Hallam, *Mid. Ages*, II. 401, who refers to a learned and elaborate essay in *Edinb. Rev.* XXX. 115.

We find it represented among the Scandinavians, later with the Germans, and also in the Saxon compurgators above considered. In fact, this coincidence of numbers has been the cause of drawing many hasty analogies and of forming divers ingenious theories concerning the origin of our jury. As illustrative hereof, is appended a curious passage from a legal treatise, published in 1682 and attributed to Lord Somers.

"In analogy, of late the jury is reduced to the number of twelve, like as the prophets were twelve, to foretell the truth; the apostles twelve, to preach the truth; the discoverers twelve, sent into Canaan, to seek and report the truth; and the stones twelve, that the heavenly Hierusalem is built upon." Guide to English Juries, by a Person of Quality.

The early inquisitors and recognitors, however, varied in number from seven and even less to sixty-six. Vide Brunner, Schwurz, 111-112. 273-274, 363-364.

formation, whether acquired by sight of the occurrences or by traditions in the vicinage, or by any other means, they rendered their decision or verdict, *vere dictum*, upon oath. As they assumed to speak upon oath, from their own personal knowledge, they were liable to the penalties of perjury, if they returned a false verdict."<sup>20</sup>

Thus there was substituted, for the mere numerical preponderance of oaths, by irresponsible Compurgators, a decision upon knowledge, by twelve Recognitors, who "acted upon some cognizance of the facts involved in the dispute, but they derived that information from themselves; they were, indeed, a *jury of witnesses* testifying to each other."<sup>21</sup>

<sup>20</sup> Pomeroy, Mun. Law, § 125.

<sup>21</sup> *Id.* § 126.

With the establishment of recognitions, there thus existed, simultaneously, in the Anglo-Norman period, a great variety of modes of trial (*leges*). Trial by battle (says Thayer, Harv. Law Rev. IV. 158) was the *lex ultata*; by the ordeal, *lex apparens, manifesta* or *paribilis*; by the oaths of compurgators, *lex probabilis*; by simple oath, *lex simplex*; by record, *lex recordationis*; and by inquest or assise, *lex inquisitionis* or *recognitiōis*.

"By *lex terre* is meant the procedure of the old popular law." Brunner, Schw. 254.

## CHAPTER IX.

### THE ASSISE OF HENRY II. AND THE CIVIL JURY.

Such were the institutions brought over with, or developed as a result of, the Norman Conquest, and which prevailed in general as described—co-ordinately with the Anglo-Saxon institutions—until the reign of the second Henry, by which time the national unity was completed, the distinction between English and Normans had disappeared, and the nation had become one and realized its oneness; a realization which is necessary before the growth can begin.<sup>1</sup>

Not until the reign of King Henry II., writes Reeves,<sup>2</sup> did the trial by jurors become general—the trial by an indefinite number of *sectatores* continuing for many years after the Conquest. In that reign, many questions of facts relating to property were, instead of as hitherto by duel, tried before *duodecim liberos et legales homines*,<sup>3</sup>

<sup>1</sup> Cf. Stubbs, *Const. Hist. of England*, c. XII.

<sup>2</sup> *Hist. Eng. Law*, I. 82-88. This "great and sagacious king" courageously set his face against the ancient laws and customs of the realm, and moulded the irregular unsystematized inquisitions into permanent form. (cf. 5 *Harv. L. Rev.* 254, 256). "What he reorganized, Edward I. defined and completed." (Stubbs, *supra*.)

<sup>3</sup> The Common Law required a juror to be *liber et legalis homo*, and "under the word '*homo*,'" writes Blackstone, "though a name common to both sexes, the female is, however, excluded, *propter defectum sexus*: except when a widow feigns herself with child, in order to exclude the next heir, and a suppositious birth is expected to be intended: then upon the writ *de ventre inspiciendo*, a jury of women is to be impanelled to try the question whether with child or not." 3 *Bl. Com.* c. XXIII.; cf. Beck's *Medical Jurisprudence*, 229; *Madd. Ch.* 11; *Cycl. Pol. Sci.* II. 659.

*juratos veritatem dicere.*<sup>4</sup> This tribunal was called *assisa*, Glanville tells us, from the name of the law by which the application of this mode of trial was prescribed.<sup>5</sup> The text of this law has not come down to us, so that we are ignorant of its precise scope, or whether it preceded or succeeded the enactments of Clarendon. From Glanville (lib. 13, c. I. lib. 2, c. 7, 19) however, —who styles it *regalis constitutio*, and *regale quoddam beneficium, clementia principis de concilio procerum populis indultum*<sup>6</sup>—it appears to have introduced the trial by assise or jury in real actions as a mode of deciding facts, which the subject might claim as a matter of right; so that, for the trial of all questions involving the seisin (*i. e.* the lawful possession) of or the right to land, the tenant or defendant might claim the intervention of twelve good and lawful men, then termed

This Matrons' Inquest is, in modern practice, replaced by a jury of physicians. Thus in New York, the Code of Crim. Proc. (§ 501) provides for the impanelment of six physicians, one or more of whom may be summoned from an adjoining county, and none of whom "need be qualified to serve as a juror in a court of record."

<sup>4</sup> Mr. Whitridge cites as the earliest appearance of these "twelve free and lawful men, sworn to speak the truth," a suit between Gundolph, bishop of Rochester, and Pichot, king's sheriff, affecting the title to certain lands in Kent (reported *Textus Roffensis*, Thorpe 81). "This is the first case of which we have any record, in which the decision was rendered by a limited number of suitors, or *pares curie*" [see however, as to these, *post*, chap. XI]. "Mr. Forsyth insists that the twelve here were merely compurgators, while Mr. Starkie thinks the case a precedent which must have had much weight, and which established if it did not introduce the trial by jury." The writer himself concludes "that the practice or custom described in the foregoing account was the beginning from which that institution which was incontestably the trial by jury was developed by the Norman lawyers during the time of the Plantagenets." *Cycl. Pol. Sci.* II. 658-654. Bigelow, *Plac. Anglo-Norman*, 34.

<sup>5</sup> Cf. *post*, note 9.

<sup>6</sup> Cf. *ante*, chap. VI. note 15.

recognitors,' while the proceeding, collectively, was termed *recognitio*, *assisa*, or *percognitio*. And it also appears that this proceeding, both by analogy and by force of custom, was wont to be resorted to for determining other questions than those concerning land to which it was limited by the statute—namely questions incidentally arising in a recognition (*e. g.* whether a party was a freeman and therefore entitled to this mode of trial, or what was the usage of a particular locality, or the right of a challenged recognizer to serve on the inquest)—and then the institution was termed a *jurata*,<sup>9</sup> and the process was said to be *per juratam patriæ* or *vicineti*, *per inquisitionem*, or *per juramentum legalium hominum*.

Hence the assise<sup>10</sup> of Henry II. "was in its original constitution nothing more than a body of twelve knights, empanelled to determine by their testimony a disputed question of seisin of land, right to an advowson, or villenage"—*i. e.* questions of real estate and status. "In it we first find the jury in its distinct form, but the elements of which it was composed were all familiar to the jurisprudence of the time, and . . . except as regards its definite constitution, it involved no idea novel to the minds of our ancestors."<sup>10</sup>

<sup>9</sup> *i. e.* the jurors impanelled in an assise, so called because they "acknowledged" a disseisin by their verdict. Bracton, *de Legibus*, I. 5. The *recognitio* was the "answer" to the *inquisitio* or inquiry, made by a body of witnesses.

<sup>10</sup> See post, chap. X.

<sup>11</sup> "The word '*assise*' means nothing more than statute or enactment. Hence the recognition by jurors was called an assise, because it was established by an assise or statute of Henry II." Forsyth, p. 122, note; cf. 3 Bl. Com. c. X.; Stubbs, *Const. Hist.* c. XIII. pp. 614-618.

And in Germany, the tribunal for trying criminal causes is still termed *Assise*.

<sup>10</sup> Forsyth, pp. 140, 122.

In accordance with this view, Stubbs<sup>11</sup> writes: "Henry II., if not the inventor, was the great improver of the system of recognitions by jury." The machinery which had been occasionally used before—to wit, in the Inquisitions on part of the crown, referred to in the preceding chapter—"he applied to every description of business. By the ordinance of the grand assise," the person whose possession of land was impugned [*i. e.* the defendant or 'tenant,' plaintiff being termed the 'demandant'] was empowered to make choice<sup>12</sup> between trial by

<sup>11</sup> Select Charters, pt. I. p. 24.

<sup>12</sup> So a German scholar writes: "It was enacted under Henry II. that in certain civil causes, in which the trial by duel had hitherto been the sole medium of determination, henceforth either party should be justified in evading it and petitioning the king's court to determine his right by means of a recognition by twelve trustworthy men from the same hundred (*se ponere in assisam et petere recognitionem per XII. legales homines*)." Bluntschli's Staats-Woerterbuch, vol. IX. p. 347.

Where the tenant in a writ of right put himself on the grand assise, it was not a question whether the demandant consented, but whether he had a good reason to refuse. Glanv. II. c. 6.

<sup>13</sup> *Ante*, pp. 98-99.

<sup>14</sup> There are two theories as to the origin of this phrase: Reeves (I. p. 68) maintains that only the twelve jurors in questions of right, as distinguished from seisin, were called *magna assisa*, because they were knights, summoned not immediately by the sheriff, but selected by four electors; while Forsyth (p. 125 note) holds that it was termed *magna*, on account of the important matters with which it had to deal. "The names of those who were to serve on the grand assise being known beforehand, endeavors to make sure of a favorable verdict were naturally to be anticipated, and in proof of this fact it is to be noticed that three different statutes of Edward III. are directed against the bribing of jurors." Cyc. Pol. Sci. II. 654-655; cf. Bentham, Art of Packing Applied to Special Juries.

<sup>15</sup> The course of proceeding was for the demandant, who had been dispossessed of certain lands, to offer to prove his case by presenting a combatant "*qui hoc vidit vel audiit*" (Glanville); and the champion "must first swear that he knows the land was the right of the party he fought for, or that his father told him he knew it and charged him to bear witness thereof." (Sullivan's Lect. 251.) "As it was supposed that God interfered on behalf of right, a defeat was regarded as a proof of falsehood . . . and hence not only did the party whose champion

battle, and the examination of his right by a body of twelve sworn knights or freeholders, who were selected by four sworn knights or freeholders [*militēs*]<sup>16</sup> summoned for this purpose by the sheriff acting under a royal writ." . . . Out of these recognitions arose the whole system of trial by jury; the jurors are at first witnesses of the fact; as business increases they are, under Edward I., *afforced*<sup>17</sup> by the addition of persons better acquainted with the matter; a further step separates these *afforcing* jurors from the original twelve, and the former [*afforcers*] then engross the character of witnesses, the jurors becoming the judges of fact after hearing evidence." Indeed, it is said that until about the reign of Henry VI. (1422-1461) trial by jury to all intents and purposes was a trial by witnesses.<sup>18</sup>

was vanquished lose his suit, but the champion was himself punished as guilty of the offense of having borne false witness. . . . But the tenant was not obliged to accept the combat thus offered. He might, unless a valid objection"—such as descent of both parties from one who once had owned the land—"was taken by his adversary, avail himself of the enactment of Henry II. and choose the trial by assise, *magna assise domini regis*." Forsyth, *Trial by Jury*, pp. 124, 125; cf. *ante*, chap. VIII. p. 96 ff.

<sup>16</sup> *Militēs* ". . . were the knights or freeholders whom we read of in our old books and Acts of Parliament, who were used in trials of causes and returns of jurors in writs of right." Umfreville, *Lex Coronatoria*. "They were called *militēs* because legally compellable to be such, although they were not actually knighted." Forsyth, appendix I.

<sup>17</sup> ". . . Twelve *legales homines* . . . were upon oath to decide which party was in the right (*utrum A. vel B. majus jus habet in terra illa*)." Bluntchli's *Staats-Wörterbuch*, in *loc. cit. ante*, note 12.

Glanville (lib. XIII. cc. 1, 2, 14, 16) enumerates eight forms of recognition, based on as many assises, of which only *Mort d'Ancestor* and *Novel Disseisin* proceeded by virtue of original writs. In 1258, a great impetus was given to trial by jury by a statute (Westm. II. c. 24) empowering clerks in chancery to issue new writs in *constitutis casu*.

<sup>18</sup> For an account of the *afforcing* process, see *post*, p. 112.

<sup>19</sup> Macclachlan, *Eng. Cycl.* III. 26.

What, apart from the historical reasons alluded to and the precedent afforded by the official Inquisitions, was the immediate source of the assise? The ratiocination of Mr. Forsyth<sup>30</sup> seems conclusive, and may be advantageously transcribed. He concludes that "in the earliest times, disputes respecting lands were decided by the voice of the community of the county or hundred, as the case may be, where the parties lived; that afterwards a select number was substituted for the whole, who gave their testimony upon oath, and therefore were called the '*jurata*;' and that this suggested to Henry II. and his councilors"—among whom, *facile princeps*, Glanville—"the idea of the assise, which was nothing but the *jurata* in a technical form, and limited to *milites* or knights who were summoned by a writ of the sheriff in virtue of a precept from the king." And, in another place, he observes that, in suits respecting lands, at that time "the constant practice was to decide the controversy by appealing to the knowledge of the neighborhood"—*decurrendum erit ad vicinetum*, as Glanville has it—"where the parties resided and the lands lay; and frequently a limited number of persons were sworn who represented the vicinage," and who stated on oath to

<sup>30</sup> Trial by Jury, p. 143 ff.

<sup>31</sup> "Anciently the *seisin* was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighborhood, who attested such delivery in the body or on the back of the deed. . . . And though afterwards the ocular attestation of the  *pares* was held unnecessary, and livery [of *seisin*] might be made before *any* credible witnesses, yet the trial in case it was disputed (like that of all other attestations) was still reserved to the *pares* or jury of the county." 2 Bl. Com. c. XX.; cf. bk. III. c. XXIII.

The reader is also referred, for some interesting comment on the union of jurors and witnesses and on jural functions in general, to Mr. Best's treatise on Evidence (Chamberlayne's ed.) pp. 190-192, 194, 246.

And see *post*, notes 48, 51, 52.

whom the property belonged. These were called the *probi et legales homines*, and their verdict [*veredictum vicineti*] was conclusive of the question in dispute. . . . There was no difference whatever in principle between these inquests and the recognitions by the knights of the assise; and it seems, therefore, that the idea of the latter was derived from the former. In both cases the verdict was the testimony of witnesses cognizant of the matter in dispute; and if we substitute a determinate number of knights for the *probi homines* of an ordinary inquest, we have at once the assise."

Such was, in its general outline, the assise instituted by Henry II., and the incidents and precedents on which it was based; it remains for us to review the several statutory regulations by which it was affirmed and established on a stable basis. It should be premised that, during the period elapsed since the Conqueror's death, the assumptions of the clergy had—coincident with the growth of the Roman hierarchy—become greater than ever before; the ecclesiastics claiming exemption from the judicial process and the laws of the realm, and asserting the supreme authority of the civil law in their own tribunals, and the exclusive jurisdiction of the latter in causes where a member or dependent of the clergy was a party or where ecclesiastical rights were involved. We have referred before<sup>22</sup> to the impetus which the Roman Law received by the establishment of the Italian universities at the end of the 11th century, to the lectures upon it which the English clergy caused to be delivered at Oxford, and to the potent manner in which this movement ultimately affected our jurispru-

<sup>22</sup> *Ante*, chap. V. notes 8, 10, 15.

dence by engrafting civil principles upon the common law, and by establishing admiralty and equity jurisprudence.

The immediate effect, however, was quite another. For the monarch's determination to check what he considered the clerical tendency towards establishing an *imperium in imperio*, and to restrain their assumptions within more moderate limits, led in 1152 to King Stephen's prohibition of the study of the civil law, and in 1164 to King Henry's enactment of the Constitutions of Clarendon" (so called from the village of that name) which "were calculated to give a rational limitation to the secular and ecclesiastical jurisprudence; and furnish a basis on which these separate jurisdictions might have been founded, without any inconvenience to the nation or diminution of the temporal authority; and they were with that view confirmed, A. D. 1176, at a council held at Northampton."<sup>33</sup>

The section in these Constitutions which more immediately concerns us, as being the first statutory mention of the jury, is the ninth, providing in disputes between laymen and clerks a recognition by twelve lawful men : "*Si calumnia emergerit inter clericum et laicum vel inter laicum et clericum, de ullo tenemento quod clericus ad*

<sup>33</sup> "Nothing will enable us" writes Reeves, "to judge so well of the pretensions of the clergy, as a perusal of these Constitutions;" which he proceeds to state at length in vol. I. pp. 76-79. "They are contained in sixteen articles; ten of which were considered by the see of Rome as so hostile to the rights of the clergy, that pope Alexander in full consistory passed a solemn condemnation on them; the other six he tolerated, not as good, but less evil." Chapter I. was among the latter, but chapter IX. was one of the condemned ones. *Constitutio* (like *assise*) was originally a name for any legal enactment.

<sup>34</sup> *Id.* Hist. Eng. Law, c. II.

*eleemosinam velit attrahere, laicus vero ad laicum feudum, recognitione duodecim legalium hominum, per capitalis Justitiæ regis considerationem terminabitur, utrum tenementum sit pertinens ad eleemosinam sive ad laicum feudum, coram ipso Justitia regis.*" Hence the question, whether an estate was a lay or an ecclesiastical fee, is the most ancient issue referred to a jury.

By the statute of Northampton, above referred to as affirming the preceding one, the province of the jury is (in 1176) extended. It is provided by section 4: "*. . . Et si dominus feodi negat hæredibus defuncti saisinam ejusdam defuncti quam exigunt, Justitiæ domini regis faciant inde fieri percognitionem per duodecim legales homines, qualem saisinam defunctus inde habuit die qua fuit vivus et mortuus: et sicut recognitum fuerit, ita hæredibus ejus restituant. Et si quis contra hoc fecerit et inde attaintus fuerit, remaneat in misericordia regis.*"<sup>28</sup>

<sup>28</sup> *Constitutio Clarenduna*, c. IX. rendered by Reeves (I. 78) as follows: If there shall arise any dispute between an ecclesiastic and a layman, or between a layman and an ecclesiastic, about any tenement which the ecclesiastic pretends to be *eleemosynā* [i. e. for charitable uses] and the layman pretends to be a lay fee, it shall be determined by the judgment of the king's chief justice, upon a recognition of twelve lawful men, *utrum tenementum sit pertinens ad eleemosynum, sive ad feudum laicum* [whether such tenement be held as an ecclesiastical or a lay fee].

"*Legalis homo*: a man possessed of all the rights of a freeman." Stubbs, *Select Charters*, p. 544. Cf. Spelman, *Gloss. Arch.*

<sup>29</sup> **TRANSLATION:** And if the lord of a feof denies to the heirs of a decedent the seisin which they demand, the justices of our lord the king shall thereupon by twelve lawful men cause to be made an enquiry, as to what seisin the deceased had thereof on the day when he was alive and died; and according to their finding, shall restitution be made to his heirs. And if anyone shall act contrary hereto and be attainted in consequence, he shall be dealt with according to the mercy of the king.

"To be at the king's mercy was, to lie in such a position that the king might either exercise the right of complete forfeiture or accept a fine in commutation." Stubbs, *Select Charters*, p. 545.

Thus the question whether an heir was entitled to succeed to the estate of his ancestor, in cases where the lord of the fee denied that such ancestor died seised of an estate of inheritance, was to be submitted to the jury. Whence this proceeding was called an assise of *Mort d'Ancestor*.

And, by the same statute, it is further provided, in section 5: "*Item justitiæ domini regis faciant fieri recognitionem de disseisinis factis super Assisam, a tempore quo dominus rex venit in Angliam proximo post pacem factam inter ipsum et regem filium suum.*"<sup>27</sup>

By this clause, all cases of disseisin or dispossession from land, claimed to have occurred since the peace of 1173, were directed to be similarly tried by a jury, which was then called an assise of Novel Disseisin. But seven jurors sufficed therein (Bracton 179*b*).

In 1181, the functions of the tribunal were further extended—or, rather, the functions of some of the royal inquests above<sup>28</sup> referred to were formally revived and legalized—by the enactment of the statute termed the Assise of Arms, whose purpose was to create a permanent militia. "The importance of the assize," writes Stubbs, "as illustrating the constitutional point of recognition by jury for the purpose of taxation . . . depends chiefly on article 9."<sup>29</sup>

So the importance of the ordinance of the Saladin

<sup>27</sup> TRANSLATION: Likewise the king's justices shall cause inquiry to be made concerning the disseisins made by assise, from the time when the king came to England immediately after the peace between himself and the king his son.—The same phraseology was used in the Assise of the Forest (1184).

<sup>28</sup> *Ante*, chap. VIII. pp. 93-96.

<sup>29</sup> *Select Charters*, p. 154.

tithe," passed in 1188, consists, according to the same authority, "in the fact of the employment of local jurors to determine the liability of individuals" with reference to the taxation of their personal property, "as had been done in 1181 in the assize of arms."<sup>20</sup> Thus, by the several statutes aforesaid, the function of the assize was fixed and definitely determined as the trier of disputed facts in the cases enumerated; all of them, too, were passed under Henry II., no doubt influenced by the advice and acting under the counsel of the Justiciar,<sup>21</sup> Ranulph Glanville.

By Magna Charta (1215) the provisions of Clarendon and Northampton were re-affirmed, it being enacted by Cap. 18: "*Recognitiones de nova disseisina, de morte antecessoris, et de ultima presentatione, non capiantur nisi in suis comitatibus et hoc modo; nos, vel si extra regnum fuerimus, capitalis justiciarius noster, mittemus duos justiciarios per unumquemque comitatum per quatuor vices in anno, qui, cum quatuor militibus cujuslibet comitatus electis per comitatum, capiant in comitatu et*

<sup>20</sup> This was "a tax imposed in England and France, in 1188, by Pope Innocent III., to raise a fund for the crusade undertaken . . . against Saladin, Sultan of Egypt, then going to besiege Jerusalem. By this tax every person who did not enter himself a crusader, was obliged to pay a tenth of his yearly revenue and of the value of all his moveables, except his wearing apparel, books, and arms. . . . Thus arose the tithing of ecclesiastical benefices for the Pope or other sovereigns." Wharton, *Law Lex.* 864.

<sup>21</sup> *Select Charters*, 159.

<sup>22</sup> As to this officer, see Bispham's *Eq.* (8d ed.) p. 6; Stubbs, *Const. Hist.* 346 ff.; Campbell, *Lives of the Chief Justices*, c. I.

He appears, from a few years after the Norman conquest until the latter part of the reign of King John (a period of over 125 years) to have combined the powers of a prime minister or viceroy with those of a chief justice.

*in die et loco comitatus assisas prædictas.*”<sup>33</sup> The importance of this article lies in the fact, that it established a regular system of administering the law, by providing that two judges, at four stated times each year, were to visit each county, summon before them the parties and the jurors (the latter then being selected by four chosen knights of the county) and hold the assise with reference to the disputed territory or tenement; and the justices so commissioned were termed Judges of Assise. By Cap. 40, the practice of exacting as arbitrary fee for granting recognitions, even when matter of right, was forbidden.

While, to insure a more perfect administration of justice, and to secure the jury against being hampered or having its intended sphere of action infracted or its efforts rendered abortive by ignorant judicial functionaries, it was further ordained in Cap. 45: “*Nos non faciemus justiciarios, constabularios, vicecomites vel balivos, nisi de talibus qui sciant legem regni et eam bene velint observare.*”<sup>34</sup> That is, the selection of judges, as well as of sheriffs and other executive agents of justice, was to be made from the number of those “learned in the laws of the realm and law-abiding”—a prescription which, parenthetically speaking, might sometimes be advantageously enforced in our country at the present day.

<sup>33</sup> TRANSLATION: Recognitions of Novel Disseisin, of Mort d’Ancestor, and of Last Presentment shall not be taken except in their own counties and in manner following: we, or if we shall be out of the kingdom, our chief justiciar, will send two justices into each county four times a year, who, together with four knights chosen in each county by the county, shall hold the aforesaid assises on the day [stated] and at the county seat.

<sup>34</sup> TRANSLATION: We will not appoint justices, constables, sheriffs or

And, finally, in the middle of the thirteenth century<sup>28</sup> the jury had become so firmly established, and was regarded and utilized as so important a factor in the administration of justice, that Bracton (*de Laud.* bk. IV. c. 19) devotes much space to the description of the institution and form of trial as then existent, from which it appears that the circumstances which tended to disqualify a man from serving as a juror corresponded closely with the disqualifications of witnesses at a later day,—being perjury, serfdom, near relationship, enmity and intimacy.

What has been said above about the judges causing to be summoned "the parties and the jurors," no reference whatever being made to witnesses, is strictly true; for while with us the jury receives information from the witnesses, the witnesses at that time constituted the jury, since, as Forsyth remarks, "this proceeding by assise,"<sup>29</sup> was nothing more than the sworn testimony of a certain number of persons, summoned to give evidence

balliffs, except from among those who know the laws of the realm and are willing faithfully to observe them.

<sup>28</sup> "The wonderful thirteenth century, the great creative and destructive age throughout the world." Freeman, *Eng. Const.* c. II.

The jury had then become "the one regular common law mode of trial . . . by its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges." Thayer, 5 *Harv. L. Rev.* 259.

<sup>29</sup> An instance of this process may be quoted, from the *Chronica Jocelini de Brakelonda* (p. 45): *Cumque inde summoniti esset recognitio duodecim militum in curia regis facienda, facta est in curia abbatis apud Herlavam per licentiam Ranulfi de Glanvilla, et juraverunt recognitores se nunquam scivisse illam terram fuisse separatam ab ecclesia.*

TRANSLATION: And when thereupon a recognition of twelve knights had been summoned to be held in the king's court, it was held in the abbot's court at Harlow by permission of Ranulph de Glanville, and the recognitors swore that they had never known that land to have been separated from the church.

Forsyth quotes the following entry of the verdict of an assise, and the

upon matters within their own knowledge. . . . If, however, some did and some did not know [the facts in dispute], the latter only were removed and others summoned in their place, until twelve at least were found who knew and agreed upon the facts. Also if the jurors when chosen were not unanimous, others were to be added to the number until twelve at least agreed in favor of the one side or other. This was called afforcing the assise."<sup>77</sup>

And, again, "the peculiarity by which their evidence was then distinguished was, that it was conclusive of the facts in dispute. The *veredictum* of a jury was always an estoppel against any averment to the contrary, unless they could be convicted of manifest perjury and fraud—and this could only be done by a subsequent proceeding . . ." called an attain, for anciently new trials were unknown. It consisted in subjecting the action of a jury, which had given an obviously erroneous verdict, to revision by a second jury; and, if the latter (by a different verdict) convicted the former of having delivered one falsely, this was held to imply perjury in the first jury, rendered them infamous, and forfeited their lands and chattels to the king—

decision rendered in accordance therewith by the court, from the Rotuli Curie Regis:

*Assisa venit recognoscendum, si Robertus filius Walteri injuste et sine judicio disseisavit Isabel de Benninton de libero tenemento suo in Benninton infra assisam. Juratores dicunt quod non disseisavit eam ita. Judicium: "Robertus teneat in pace; et Isabel pro falso clamore sit in misericordia."*

TRANSLATION: The assise came to inquire, whether Robert the son of Walter had unjustly and without a verdict under the [statute of] assise disseised Isabel of Benninton of her freehold in Benninton. The jurors said that he had not thus disseised her. Judgment: Let Robert peacefully possess [the estate], and Isabel for her false charge be at the mercy [of the king.]

<sup>77</sup> Trial by Jury, pp. 127, 128.

while the judgment based on their verdict was accordingly reversed. "The attaint was a remedy for a corrupt verdict in civil cases, and was tried by a jury of twenty-four . . . It deserves notice as one of the many proofs . . . that jurors were originally witnesses. Perjury by a witness was not a crime known to the law of England till the reign of Queen Elizabeth. The only form of that offense . . . was the perjury of jurors, which made them liable to an attaint." Whether this remedy was applicable in criminal cases also, seems doubtful; but if so, it was only at the suit of the crown. (Stephens, Hist. Crim. Law, I. 306, 307, 255.)

The attaint (called by Bracton *convictio*, later *attincta*) appears to have originated in England, about 1200, from the mere favor of the king, accorded for a consideration to disappointed suitors (Brunner, Schw. 372). It was "a proceeding in which the original parties and also the first jury were parties, and where a larger jury, made up of [24] knights or other more considerable persons than the first, passed again on the same issue." The attaint-jury was bound to proceed on the same evidence upon which the first jury had passed; for if the latter (says Shelley, J., in *Rolfe v. Hampden*, Dyer 53b) had acted on "pregnant and manifest proof and evidence," although "in fact false," the attainters should not be prejudiced thereby but "ought to weigh in their consciences what themselves would have done upon the same strong evidence . . . for *homines sunt mendaces et non angeli*." And it was held in the same case that the plaintiff in attaint could not give more evidence or call more witnesses than he had given to the petit jury, but the defendant might do so to sustain the first verdict. See also 11 Assizes, pl. 19.

A contrary finding of the attainters was thus tantamount to a conviction of the first jury of having, in their character as witnesses, given false evidence in the form of a "verdict." A reversal of the original judgment followed as of course, and the twelve "perjurers" were punished by imprisonment for at least a year and forfeiture of goods, and also became infamous: "for they shall not afterwards be *othesworth*" (Bract. 292*b*). By statutes in 1495, 1531 and 1571, the imprisonment and forfeiture were commuted into a pecuniary penalty, and the attain limited to cases where the verdict was not less than £40 (Stat. 13 Eliz. c. 25) which remained substantially the law governing attaints until their formal abolition.

In the meantime, however, they had—because of the extraordinary expense, delay and uncertainty which the employment of this cumbersome apparatus involved, and which two statutes (11 Hen. VI. c. 4, 15 *Id.* c. 5) had vainly sought to remedy by increasing the property qualifications of the attain jurors and imposing new penalties on the others,—gradually fallen into "innocuous desuetude." Thus in 1565, Sir Thomas Smith (Com. of Eng. bk. III. c. 2) remarks: "Attaints be very seldom put in use, partly because the gentlemen will not meet to slander and deface the honest yeomen, their neighbors; so that for a long time they had rather pay a mean fine than to appear and make enquest." A century later, Chief Justice Hyde (*Anonymous*, 1 Keb. 864) used language to the same effect. In 1757, Lord Mansfield declared (in *Bright v. Eynon*, 1 Burr. 393) that "the writ of attain is now a mere sound in every case." While Blackstone (whose Commentaries were published in the

next decade) treats the institution as practically obsolete. It received the *coup de grace* in 1825 by Stat. Geo. IV. c. 50. § 60, which enacts that attaints shall "henceforth cease, become void, and be utterly abolished."

It should be noted that in the early days, consistently enough, the judges themselves were likewise punishable for errors in law—a modified survival of the old Saxon practice [already mentioned, *ante*, pp. 51, 92] requiring judges to defend their judgments by duel. Several instances are given in Bracton's Note Book. Thus in one case (*Id.* II. 564) in 1231, involving a very technical point of procedure, it was held "that the said justices erred . . . and made a false judgment; and therefore the justices are amerced." <sup>38</sup>

<sup>38</sup> We are mainly indebted for the above definition and description of the attaint to Prof. Thayer's paper in 5 Harv. L. Rev. pp. 364-376, where many other interesting cases may be found. Commenting on the fact that it never gained any foothold in criminal trials, he adds (*Ibid.* 378): "The king, in criminal cases, was no mere ordinary party to an action; the procedure was heavily weighted in his favor. In treason and felony, the accused could not have counsel; later, when witnesses could be had for the king, he could not have them; and still later, when he also could have them, his witnesses could not be sworn. The king, therefore, had small need of the attaint . . . and the doctrine was ancient that one should not be twice put in jeopardy for the same offense. . . . The influence of the crown was sufficiently strong to prevent much injustice as against the prosecution. On the other side, the natural sympathy of the jury with accused persons, and the operation of humane maxims and sentiments, secured a tolerable fairness." [But see the remarks of Hargrave, quoted chap. X. p. 149].

Later, the practice of fining and imprisoning the jury was adopted as a corrective of perverse convictions or acquittals [as to which see Throckmorton's and another case, *post*, chap. X.]. As late as 1686, Kelyng, C. J., fined a jury £5 apiece for bringing in a verdict of manslaughter when he had directed them to find murder (Kel. 50); and the year following (in *Rex v. Windham*, 3 Keb. 280) he went to the extreme of fining eleven *grand jurors* \$20 each for refusing to find an indictment for murder. The matter was brought before the House of Commons by the defendant, which, after hearing the Chief Justice in his own defense (8 How. St. Tr. 993), by resolution condemned the fining and imprisonment of jurors as illegal. The whole practice ignominiously petered out in 1670, with

After attaints had become obsolete, and the fining and imprisonment of jurors had been declared illegal, some other method for revising verdicts against evidence had to be devised. It was then that the courts seized upon the ancient precedent of awarding a new *venire*—or writ directing the sheriff to summon a new panel of jurors—where the jury had been guilty of misconduct,"

the case of *Busshell* (Vaughan, 135), one of the jurors who had been fined and imprisoned for acquitting William Penn on the charge of taking part in an unlawful assembly, whereupon *Chief Justice* Vaughan ordered his discharge from custody and "pronounced that memorable opinion which ended the fining of jurors for their verdicts and vindicated their character as judges of fact." (*Ibid.* 332).

As to the case last cited see also *post*, p. 120, and note 48.

29 "Applications to set aside verdicts for the misbehavior of jurors are addressed to the sound legal discretion of the court, and cannot ordinarily be brought to the test of any fixed and definite rule. Each application must be determined mainly upon its own peculiar facts and circumstances, and should be granted or refused with a view, not so much to the attainment of justice in the particular case as to the ultimate effect of the decision upon the administration of justice in general." *Hutchinson v. Consumers Coal Co.* 36 N. J. L. 24.

A quotient verdict—i. e. one "rendered upon an agreement for one-twelfth of the aggregate amount of the several estimates by the jurors,"—is not invalid, unless the jurors agree in advance to abide by such a result; and this must be established by extraneous evidence, for the affidavits of jurors themselves are admissible only to support, but not to impeach their verdicts. *Moses v. Central Park R. R. Co.* 8 Misc. 322, where Judge Pryor learnedly reviews the authorities. But a party "is not allowed to take the chances of a favorable verdict and yet reserve the right to impeach it for known irregularities," per Daly, *Ch. J. Walsh v. Matchett*, 6 Misc. 114; cf. *People v. Flack*, 57 Hun 96.

It is held improper conduct in jurors to receive out of court anything of an evidentiary nature. "This occurs when jurors experiment, visit the *locus in quo* without the permission of the court, makes evidential statements to their fellows founded on their own personal knowledge, communicate with witnesses or other parties [or counsel] out of court, or consult any book or paper influentially bearing on but not admitted as evidence in the case." 12 Am. & Eng. Enc. Law 379, and notes.

Nor should counsel read from a law book to the jury: *Lesser v. Perkins*, 39 Hun, 341—certainly not where "the extracts read were not expressive of the law of the case" and exception is duly taken to the court's approbation of such course.

such as partaking of food while deliberating," or taking a paper privately from a party in whose favor they subsequently found."

The introduction of new trials, in assumed reliance on these frail precedents—but really by judicial legislation—may safely be ascribed to the year 1655, when Chief Justice Glynne (in *Wood v. Gunston*, Styles, 462) after full discussion granted a motion to set aside a verdict of £1500 in a slander suit, on the ground that the damages were excessive. For seven years before (in *Slade's Case*, Styles, 138) the King's Bench had refused to grant such a motion,—although the judge presiding at the trial had certified that "the verdict passed against his opinion,"—on the ground that such a procedure was

But the effect of misconduct on a jury is deemed waived, unless promptly complained of by the party aggrieved. "A party cannot be permitted to lie by after having knowledge of a defect of this kind and speculate upon the result, and complain only when the verdict becomes unsatisfactory to him," *Selleck v. Sugar Hollow Turnp. Co.* 13 Conn. 453; cf. *Valiente v. Bryan*, 66 How. Pr. 302.

In *People v. Mitchell*, the supreme court of California (34 Pac. Rep. 608) set aside a conviction of murder, because it appeared that during the trial several jurors had visited a disreputable place kept by one of the defendant's principal witnesses, and had there talked about the case. Such conduct "indicates a lack of that high appreciation of the duties and responsibilities of jurors essential to the purity of the jury system," and, having become notorious before the verdict was rendered, "their freedom of action was foreclosed."

In commenting on this subject, after reference to some recent strictures of Judge Abbett at the Hunterdon circuit—where a verdict for defendant was set aside, after a trial lasting a week, because on the fourth day the foreman publicly offered to wager that the defendant would prevail.—Mr. Wilbur Larremore editorially observes (*N. Y. Law Journal*, June 20, 1898) with much point: "In other places besides Hunterdon county, New Jersey, occasional lectures by courts to panels of jurymen upon the general proprieties of their position would not be thrown away."

<sup>40</sup> Cf. cases cited in chap. XII. notes 33 and 34.

<sup>41</sup> So in a case in 1409 (*Y. B. 11 Hen. IV. 17, pl. 41*) decided by Gascoigne, Ch. J.

too arbitrary, and that the defendant might have his attaint against the jury, "and there is no other remedy in law." By the end of the century, in any event, this method of supervising and revising the verdicts of juries was an established factor in English jurisprudence.<sup>43</sup>

Returning to the question of reaching a verdict, it is clear (from the ancient identity of jurors with witnesses) that verdicts were for ages predicated upon their own personal knowledge, acquired independently of the trial. "So entirely," observes Forsyth,<sup>44</sup> "did they proceed upon their own previously formed view of the facts in dispute, that they seem to have considered themselves at liberty to pay no attention to evidence offered in court, however clearly it might disprove the case which they were prepared to support" by their verdict.<sup>45</sup> A curious illustration of this state is afforded, as late as the year 1540, by the record of a case<sup>46</sup> in the court of exchequer chamber. Here Atkins, Counselor,

<sup>43</sup> Prof. Thayer concludes some consideration of the subject of new trials (6 Harv. L. Rev. 885-888) with this comment concerning the Statute of Frauds: "There is reason to surmise that a leading motive in the enactment [29 Chas. II. c. 8, A. D. 1676] of that singular and very un-English piece of legislation . . . was found in the uncertainty that hung over everything at a period when the law of proof was so unsettled. The attaint as an operative thing had vanished, while the law of new trials was in its tender infancy, and the rules of our present law of evidence but little developed."

<sup>44</sup> Forsyth, p. 131.

<sup>45</sup> "The present form of the jurors' oath is that they shall 'give a true verdict, according to the evidence' . . . but for several centuries after the Conquest, the jurors both in civil and criminal cases were sworn merely to *speake the truth* (Glan. II. 17; Bract. III. 22). Hence their decision was accurately termed *verdictum*, or verdict; whereas the phrase "true verdict" in the modern oath is not only a pleonasm, but is etymologically incorrect, and misdescribes the office of a juror at the present day." Knight's Eng. Cycl. III. 26.

<sup>46</sup> *Rentger v. Fogossa*, Cam. Scac. (4 Edw. VI.) 1 Plowd. 8, 12.

observed: "I may put the matter to the Inquest without any witness, and their knowledge shall aid me, and not the knowledge of the witnesses, for they may give a verdict contrary to the witnesses; and so the witnesses and their testimony is not very material when there is an inquest."<sup>46</sup> And Robert Brooke, Recorder of London, approvingly refers to these remarks, saying *arguendo*:<sup>47</sup> "If witnesses were so necessary then it would follow that the jurors could not give a verdict contrary to the witnesses, whereas the law is quite otherwise, for when the witnesses for trial of a fact are joined to the inquest, if they cannot agree with the jurors, the verdict of the twelve shall be taken and the witnesses shall be rejected; therefore this point is clear enough."

In 1670, however, it was held<sup>48</sup> that where a juror had knowledge of facts material to an issue, he must inform the court and be sworn as a witness; and, finally, the principle was definitively and emphatically laid down

<sup>46</sup> The learned counsel cites, among other authorities, Coke on Littleton, 6 b, Heath's Maxims, 95. Even in more modern practice, the jury might, in some rare and peculiar cases, disregard testimony; for "it may so fall out that a jury upon their own knowledge may know a thing to be false that a witness swore to be true, or may know a witness to be incompetent or incredible though nothing be objected against him, and may give their verdict accordingly." Hale, Com. Law, c. 12, § II.

<sup>47</sup> In the case last cited.

<sup>48</sup> *Bushell's Case*, Vaughan, 135, 6 How. St. Tr. 999: which also declared the above described attainr proceeding illegal. So, in an anonymous case decided in 1702, it was said: "If a jury give a verdict on their own knowledge, they ought to tell the court so, that they may be sworn as witnesses; and the fair way is to tell the court before they are sworn, that they have evidence to give." *Anonymous*, Salk. 405.

And another old report states: "Where among the jury there be those having peculiar ken, let them leave the jury box and be sworn as witnesses." 1 Summerfield, 475. S. P. (A. D. 1650) *Bennet v. Hartford*, Styles, 233.

by Lord Ellenborough, in the reign of George III., that a judge who tolerated a verdict based on facts not brought out by the evidence, but founded on the jury's own peculiar knowledge, was clearly in the wrong. This was in *Rex v. Sutton*, 4 Maule & S. 532, decided 1816.

The further development of the civil jury, and the extension of its functions to other cases than those involving property rights, which the judges instituted by Magna Charta were sent into each county to try, may be collated from the work of Mr. Forsyth,<sup>40</sup> who writes: "Gradually the justices appointed to hold the assise were directed to entertain other questions than those concerning land. And special judges seem to have been from time to time nominated for this purpose distinct from the regular judges of the bench," and termed judges of assise and *nisi prius*<sup>41</sup>—from the two words forming the commencement of the writ by which their jury was summoned.

"Thus by Statute 13 Edw. I. c. 30 [A. D. 1285] it is provided that to avoid the delay and expense of bringing parties to Westminster, inquisitions of trespass and other pleas, wherein small examination is required, shall be determined before the justices of assise, and . . .

<sup>40</sup> Trial by Jury, pp. 148, 149.

<sup>41</sup> The writ recited the character of the case and set a day, on which it was triable at Westminster, *NISI PRIUS venerint justitiæ in comitatum*—unless before that day the judges came into the county where the cause of action arose, which they regularly did.

"Trials in these courts were both by assizes and juries, but the former fell gradually more and more into disuse, although as a distinct manner of trial it existed until 1838, and was only abolished by 8 and 4 Wm. IV. c. 27." Cycl. Pol. Sci. II. 655. In the time of Glanville, remarks Prof. Maitland (Pol. Sci. Quart. IV. 516), the King's Court is "beginning to make itself a tribunal of first instance for all England at the expense of the communal and seigniorial courts."

in 1306 we find the word '*assisa*' applied to the trial of an action for false imprisonment. The machinery for this mode of inquiry was ready in the existence of the *jurata*, so familiar to the people . . . in the decision of disputes. And the *assisa* supplied the model of the form in which it [the *jurata*] was henceforth to appear." And then the old lawyers said *Assisa cadit et vertitur in juratam* (Fleta IV. c. 14). "The transition from a varying number of neighbors assembled in a county or other court, to that of a fixed number, namely twelve, summoned to the assise [or *jurata*] court, was easy and slight; and the verdict of the jury was originally neither more nor less than the testimony of the latter."

While, therefore, with both assise and *jurata*, the verdict was based on the personal knowledge of the jurors, sitting in the capacity of witnesses," an exception existed even at common law in the cases of deeds" coming in controversy, or requiring to be pro-

<sup>51</sup> Mr. Justice Stephen observes: "It is a matter clear beyond dispute . . . that the jury anciently consisted of persons who were witnesses to the facts, or at least in some measure personally cognizant of them; and who consequently, in their verdict, gave not (as now) the conclusion of their judgment upon facts proved before them in the cause, but their testimony as to facts which they had antecedently known." Pleading, (5th ed.) 145, 480, and appendix, note 33 [cf. *ante*, note 21].

Hence it was that the allegations of counsel (unsustained by oath or proof) as to what his witnesses had to say, simply accompanied by their presence in court, were suffered to go to the jury as "evidence." 5 Harv. L. Rev. 307, 317, 361 note.

<sup>52</sup> "Anciently . . . when the execution of a deed was put in issue, process was issued against [its then more numerous] witnesses whose names appeared on the instrument, who, on their appearance in court, seem to have discharged in some respects the functions of a jury." Best, Ev. §220—citing Co. Litt. 6b.

To the same effect Stephen: "In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury." Digest Law

duced as the basis of some right. Here the matter must primarily be referred to the attesting witnesses, and the party making profert of the document was obliged "*se ponere super testes in carta nominatos, et super patriam.*"<sup>53</sup>

"In reality, however, since the jurors themselves were originally witnesses, there was no distinction between them and the attesting witnesses; so that it is by no means improbable that the latter were at first associated with them in the discharge of the same function, namely the delivery of a verdict, and that gradually in the course of years a separation took place. This separation, at all events, existed in the reign of Edward III. [1327-1377].

"As the use of juries became more frequent, and the advantages of employing them in the decision of disputes more manifest, the witnesses who formed the *secta* of the plaintiff began to give their evidence before them, and, like the attesting witnesses in deeds,

of Ev., citing Bracton, 38a; Fortescue, *de Laud.* c. XXXII. (Selden's note); cf. Co. Litt. 225.

"Afterwards the attestation of other witnesses was allowed, the trial in case of a dispute being still reserved to the *pares* [*i. e.* jurors]; with whom the witnesses (if more than one) were associated and joined in the verdict; till that also was abrogated by the statute of York, 12 Edw. II. stat. I. c. 2." Bl. Com. bk. II. c. XX.

In the same connection Washburn may be quoted: "The witnesses to a deed, according to Mr. Barrington when commenting (Statutes (4th ed.) p. 175), upon the Statute of York, were anciently a necessary part of the jury, which was to try the validity of such an instrument. This statute provides that if, upon being properly summoned, they do not appear, the jury might proceed without them." Real Prop. (3d ed.) vol. III. p. 249.

<sup>53</sup> Flota (*Commentarius Juris Anglicani*) VI. c. 33. Observe that "a witness to a deed . . . was not necessarily one who had seen it executed, but one who was willing to give it credit by his name. This may account for its turning out so often, when witnesses were questioned, that they knew nothing about the matter." 5 Harv. L. Rev. 302.

furnished them with that information which in theory they were supposed to possess previously respecting the cause of quarrel. . . . In the reign of Henry VI. [1421-1471] with the exception of the requirement of personal knowledge in the jurors derived from near neighborhood or residence, the jury system had become in all its essential features similar to what now exists . . . and this explains the origin of the venue [*vicinetum*], which appears in all indictments and declarations at the present day."<sup>44</sup>

<sup>44</sup> Forsyth, c. VII. §§ 1, 3; cf. note 21, *ante*.

To the same effect Sir James Stephen, in his *History of the Criminal Law* (Lond. 1883) writes:

"The steps by which the jury ceased to be witnesses and became judges of the evidence given by others cannot now be traced without an amount of labor out of proportion to the value of the result. . . . Trial by jury as we know it now was well established, at least so far as civil cases were concerned, in all its essential features, in the middle of the fifteenth century."—Vol. I. pp. 260, 263, citing Fortescue, *de Laud. Leg. Angliæ*, c. 26, 27.

And in criminal trials, it seems, that even while the jurors were themselves the witnesses, other witnesses might be and sometimes were called. *Id.* 259.

And so, generally, in civil cases *tam juratores quam testes* were questioned at an early period: 5 Harv. L. Rev. 302-306, 317. The latest case of witnesses to deeds being summoned to act with the jury is here ascribed to 1439. In 1465 we find a clear case (*Babington v. Venor*, Y. B. 5 Edw. IV. 5, 24) where witnesses testify openly to the jury. And there were earlier instances. (See 5 Harv. L. Rev. 358-360, where it is remarked "that this feature of a jury trial, in our day so conspicuous and indispensable, was then but little considered and of small importance.") The mode of proceeding at trial in Fortescue's time—described in his treatise *De Laudibus Legum Angliæ*, 1470—corresponds closely to that now in vogue. The right to have compulsory process against all witnesses, already recognized by the courts, received formal sanction in 1563 by Stat. 5 Eliz. c. 9, § 6.

Yet the witnesses long continued to be regarded as a subordinate factor in trials, as is apparent from a passage in Coke's *Institutes* (III. 163) written early in the seventeenth century, when commenting on certain statutes requiring the testimony of two "accusers" (*i. e.*, witnesses) in order to justify a conviction of treason. "Evidences of wit-

When, finally, attaints (or prosecutions of the jury for verdicts against evidence) fell into disuse, and the practice of new trials was introduced, juries were no longer allowed to give verdicts upon their own knowledge; but were, in such a case, expected to become witnesses.<sup>54</sup> With the desuetude of the requirement of

nesses to the jury is no part of the trial, for by law the trial in that case is not by witnesses, but by the verdict of twelve men; and so [there is] a manifest diversity between the evidence to a jury and a trial by jury."

In 23 Assizes, pl. 11, however, the functions of jurors and the distinction between them and "other witnesses" are clearly noticed; while in 12 Assizes, pl. 11 we read: "The assize came and were charged to say the truth of their knowledge (*a leur science*), and the witnesses without their knowledge, to say the truth and loyally inform the inquest."

<sup>55</sup> "This power of granting new trials, though it may sometimes almost seem to be arbitrary, must be deemed a highly salutary one, as without it the institution of trial by jury would be in danger of losing its hold upon the confidence of the public. It serves as a safeguard against the passions, prejudices and mistakes to which juries are at times subject, inasmuch as they have the ordinary weaknesses of human nature. Where the objection to the verdict is in the amount of the damages allowed, and the court is not only satisfied that there has been a mistake made, but has some test or standard by which to ascertain, approximately, what the amount should be, it is not uncommon to leave the matter somewhat to the election of the plaintiff to remit the excess . . . or have a new trial granted [to the defendant. While] where the judge upon the trial has correctly instructed the jury as to the law, and they have rendered a verdict which is incompatible with such ruling, it must be obvious that the only way in which this mistake of the law can be corrected, is by granting a new trial." Washburn, *Study & Practice of the Law* (5th ed.) p. 246.

<sup>56</sup> Cf. Best, Ev. § 119 and notes. Also notes 21, 48 and 51 of this chapter.

"A consequence of this enlargement of the functions of the jury was the creation of a field of activity for the advocate. With the handling of witnesses and the construction of their testimony for the juries, came the opportunity for the whole of the lawyer's forensic activity." Cyl. Pol. Sci. II. 656. The whole doctrine of hearsay evidence, and largely that of exceptions to the admission and rejection of evidence, and requests to charge, rest thereon. "Our singular law of evidence," says Thayer (Harv. L. Rev. V. 249, 273) "is the child of the jury."

It is not based on logic, but slowly evolved from judicial experience with unsophisticated minds, which must be tied down to the question at issue by the exclusion of hearsay and irrelevant (though pertinent) testimony.

such personal knowledge there departed, also, the necessity for the jurors to be hundredors of the district where the cause of action arose: the requirement that jurors must be summoned from the hundred or vicinage was abolished in all civil actions by 4 Anne, c. 16, § 6, and 24 Geo. II. c. 18;" and, by statute of 6 Geo. IV. c. 50, jurors are simply required to be good and lawful men from the body of the county. And in criminal cases the same practice was, by analogy, adopted.

Thus, then, we find that, since its introduction, the nature of the jury has completely changed;" for, whilst originally chosen from those familiar with the parties or cognizant of the facts, a corresponding amount of care is now taken to exclude all who are not absolutely ignorant of the matter involved, or who do not come to the trial with their minds free from any convincing impressions in regard to the subject of controversy which is to be determined by their verdict."

<sup>57</sup> "These statutes," says Mr. Starkie, "are indirect authorities for the position that jurors should not still render verdicts on their knowledge of the facts." *Cycl. Pol. Sci.* II. 656.

<sup>58</sup> Cf. Pomeroy, Johns. *Cycl. art. Jury*.

<sup>59</sup> Verdicts in civil cases consist in a finding for either plaintiff or defendant, according to the facts deemed proven by the jury, and are either general or special. They are well defined in the New York Code of Civil Procedure (§ 1186) as follows: "A general verdict is one by which the jury pronounces, generally, upon all or any of the issues, in favor either of the plaintiff or of the defendant." It incorporates the legal points involved in the charge of the judge—thus virtually embodying a decision both on law and fact—and judgment may be entered by the prevailing party in accordance therewith.

"A special verdict is one by which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereupon." Here the jury simply decides as to the existence or non-existence of alleged facts; leaving the conclusion, as to the effect of the facts thus determined, to be drawn (as a question of law) by the court. Anciently (*Co. Litt.* 228a) a jury might always, if it chose to risk attain, find a general verdict.

The verdict in criminal cases is either "guilty" or "not guilty." In

This institution had reached its state of maturity, when England's colonies were established in that portion

Scotland there is also allowed a verdict of "not proven," which is rendered by the jury in cases where there is little moral doubt of the guilt of the accused, but the legal evidence is insufficient to justify his conviction: it is so far final, that the prisoner cannot be subjected to a second trial. It is objected to as fixing a stigma on the party tried, but defended as being most in conformity with the true result of the inquiry.

In both criminal and civil cases the functions of the judge and the jury are distinct. The judge has no right to decide the fact, nor the jury to decide the law; but in some cases the jury cannot be prevented from practically deciding both. Thus, in the case of libel, juries were formerly confined to the decision of unimportant facts—Lord Mansfield holding, in the case of Woodfall, the publisher of the *Junius Letters*, that "whether the letter was libellous or innocent was a pure question of law." As the result of a heated controversy, Fox's Libel Act (32 Geo. III. c. 60) was passed, which practically made juries in these cases judges of the law also. Similar provisions have been adopted by the various states, that in the New York Constitution (art. I. § 8) being: "In all criminal prosecutions or indictments for libels the truth may be given in evidence to the jury . . . and the jury shall have the right to determine the law and the fact." cf. chap. XII. end of note 54.

The party defeated in a civil or convicted in a criminal case may, within a number of days dependent on statutory provision (or, in some jurisdictions, on the practice of the court) move to set aside the verdict and apply for a new trial on various grounds. The principal ones at common law are as follows: misdirection or mischarge to the jury by the court; admission or rejection of evidence, by the court, contrary to law; a verdict contrary to all evidence; a verdict on evidence insufficient in point of law; a verdict contrary to the weight of evidence (if disapproved by judge at the time); the ascertainment of new and material facts—not before cognizable—since the trial; the award of excessive or insufficient damages; and misconduct (*e. g.* casting lots) by the jury. cf. Stephen on Pleading, c. I.

Verdicts are also occasionally vacated, and judgments based upon them reversed, for irrelevant or extravagant statements by counsel in addressing the jury. But "the tendency is not to disturb a verdict because counsel traveled outside the record for legitimate illustration, or even indulged in flashes of lurid rhetoric." *N. Y. Law Journal*, Dec. 11, 1893.

In a very recent case, the Federal Supreme Court reversed a conviction for homicide in Arkansas, because the argument of the prosecuting attorney "was evidently calculated and intended to persuade the jury that the defendant had murdered one man in Mississippi, and should, therefore, be convicted of murdering another man in Arkansas." *Hall v. United States*, 150 U. S. 76, 37 L. ed. 1003.

of the American territory, which subsequently formed the nucleus of the United States. The common law accompanied the English settlers as an inalienable heritage, and with it as an inseparable adjunct the trial by jury. Thus in 1697 the royal governor of New York (Fletcher) harangued the provincial legislature: "There are none of you but are big with the privileges of Eng-

The principles established to guide the jury in estimating the evidence and predicating a verdict thereon, may be summarized as follows:

(1.) In criminal cases, the jury should be satisfied of the defendant's guilt beyond a reasonable doubt.

That is "not absolute certainty beyond all doubt, but beyond a substantial doubt of guilt, based on the evidence or want of it, not a mere possibility of innocence." 7 Gen. Dig. (1892) p. 937 and cases cited.

In homicide two elements of proof are necessary to establish the guilt of the accused: the death of the person alleged to have been killed, and the fact of killing by the defendant as alleged. "There must be direct proof of the one or of the other; but if one be proved by direct evidence, the other may be established by circumstances." *People v. Bennett*, 49 N. Y. 137; *vide* N. Y. Penal Code, § 181.

"Evidence is not to be discredited because circumstantial. It has often more reliable elements than direct evidence. Where it points irresistibly and exclusively to the commission by the defendant of the crime, a verdict of guilty may rest upon a surer basis than when rendered upon the testimony of eye witnesses, whose memory must be relied upon and whose passions or prejudices may have influenced their testimony. If, taken together, it leads to a conclusion of guilt with which no material fact is at variance, it constitutes the higher form of evidence which the law demands where the life or the liberty of the defendant is at stake, and neither jurors nor the court can conscientiously disregard it." Per Gray, J., *People v. Harris*, 136 N. Y. 423.

(2.) In civil cases, only a preponderance of evidence is required to sustain a verdict. cf. *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562; Chase's Steph. Dig. Ev. art. 94 and notes.

(3.) In all cases, the jury must not take into consideration any matter not bearing on the question at issue. [Thus jurors ought—and in many states the judge is by law required to instruct them—not to draw any inference from the failure of an accused to testify.]

(4.) The burden of proof (*onus probandi*) rests on the party alleging the affirmative—hence usually on the plaintiff—even though it require proof of negative propositions. cf. Chase's Steph. Dig. Ev. art. 93-97. For exceptions to the rule, see Phillips, Ev. (6th ed.) p. 185.

lishmen and Magna Charta" (3 Bancroft's Hist. U. S. 56). It was administered by the colonial courts according to the practice developed in the motherland, formed the basis of all transactions in the days before the Revolution, and, when the colonies became independent states, was permanently embodied in and guaranteed by the organic law of the latter.

As early as 1787, the superior court of North Carolina maintained the right of every citizen, under the constitution of that state, "to a decision of his property by a trial jury," and did not hesitate—"with much apparent reluctance, but with great deliberation and firmness"—to declare unconstitutional and void an act of the legislature disregarding said right."

The curious fact, however, that the Constitution of the United States, as originally adopted, in no wise refers to trial by jury in civil cases (with which alone we are at present concerned) caused its opponents at the time when its ratification was pending to claim that the clause," providing that "the supreme court shall have

<sup>60</sup> *State v. Singleton*, 1 Mart. (N. C.) 48. As to jury trial in the colonies generally, see Story, Const. (4th ed.) §§ 59, 72, 76, 89, 114, 165.—The case just cited is remarkable as one of the earliest manifestations of the peculiarly American doctrine which allows our judiciary to exercise the power of virtually annulling a legislative enactment by declaring it unconstitutional, where (in the words of Judge Harris, 17 N. Y. 235) "the Act cannot be supported by any reasonable intendment or allowable presumption." Hence judges will often decline to annul a statute which as legislators they would have refused to sustain, just as they will often deny a motion to set aside a verdict as contrary to evidence, which as jurors they would not have acquiesced in.

*Vide* Thayer, Origin and Scope of the American Doctrine of Const. Law, *Harv. L. Rev.* Oct. 1886; Cooley, Const. Lim. (8th ed.) 216; *Nation*, vol. LVII. pp. 269-270. Whether the effect of a legislative act is to deprive people of their property without due process of law, is a question of law for the court. cf. 4 *Harv. L. Rev.* 187, 188.

<sup>61</sup> U. S. Const. art. III. § 2, clause 2.

appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make," virtually abolished the civil jury. The defenders of the document, notably the authors of the contemporaneous essays subsequently (1788) collected under the title of *The Federalist*,<sup>62</sup>—"the work written for the purpose of setting forth the plan of the new government"<sup>63</sup>—claimed that no such course was intended, that the institution remained as left by the various state constitutions, and that many competent persons considered a constitutional provision undesirable since "changes in society may render a different mode of determining questions of property preferable in many cases in which that mode of trial now prevails."

The champions of the constitution were successful in securing its adoption in the original form; still, the pressure of public opinion was so strong that already the 1st Congress presented a provision supplementary to the Constitution,<sup>64</sup> which was duly ratified as follows: "In suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be

<sup>62</sup> There were eighty-eight in all—published originally (1787-1788) in the "Independent Journal" at New York—a large majority of them being written by Hamilton, the rest by Madison and Jay.

<sup>63</sup> So called by Mr. C. W. Loring, in his admirable monograph on "Nullification and Secession" (N. Y. 1893).

<sup>64</sup> Amendment VII.

In *Hess v. White*, decided by the supreme court of Utah June 9, 1893, a statute, providing that in civil actions a verdict may be rendered by the concurrence of nine jurors, was held not to conflict with the 7th Amendment; that the words "trial by jury" used therein do not mean "a jury which renders a verdict by the unanimous action of its twelve members;" that such a provision is simply a change in the procedure of applying legal remedies . . . and no man can be said to have a vested right in the unanimous action of the jury, any more than in the fact that a juror was anciently required to be a freeholder.

The better and prevailing professional opinion, however, is that so radical a change can be accomplished by constitutional amendment only. cf. Appendix; *vide* chap. XI. note 13, chap. X. note 42.

preserved. And no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." By this Amendment, then, the right to a trial by jury is deemed to be secured to a party in all cases in which it was customarily practiced wherever the law of England prevailed—that is to say, in every case except those falling under the heads of equity jurisprudence<sup>66</sup> or admiralty and maritime jurisdiction, military and naval court-martials, and the police power.<sup>67</sup>

Similar provisions were incorporated in their constitutions by the several states of the Union,<sup>68</sup> of which that of New York<sup>69</sup> may be quoted by way of illustration,

"A court of equity will decline to interfere and accord its peculiar forms of redress—such as granting an injunction or decreeing specific performance—wherever the damages recoverable in a common-law action constitute an effectual relief. "One of the grounds upon which this doctrine rests, is that the common law right of trial by jury should not be taken away in those cases, in which the wrong inflicted can be redressed in that way." *Clark's App.* 63 Pa. 450.

If a case present both legal and equitable elements, the whole must go to a jury [see chap. XI. final note].

So equity courts often send special issues of fact, presented by a case before them, into a law court there to be determined by a jury.

Whether to adopt this course, or to submit the question for investigation to a referee or master in chancery, "always rests on the sound discretion of the court. A trial at law is ordered by a chancellor to inform his conscience; not because either party may demand it as a right, or that a court of equity is incompetent to judge of questions of fact, or of legal titles." Per Grier J., *Goodyear v. Day*, 2 Wall. Jr. 283. [For some comment on the chancellor (and the Civil Law) see Bispham, Eq. p. 7.]

In New York and most of the other states, legal and equitable procedure have of late years been merged, but the remedies still are distinct, and must be sought on different sides of the same court. cf. chap. XII. n. 53.

<sup>66</sup> See post, chap. X. note 59.

<sup>67</sup> See the Appendix.

<sup>68</sup> N. Y. Const. art. I. § 2. In this state, originally, the Civil Law prevailed. In 1664, when the English seized the Colony, the first royal charter expressly established the laws of England as supreme, "and this put an end to the Roman Dutch laws imported from Holland." (Kent, Com.

being as follows: "The trial by jury," in all cases<sup>70</sup> in which it has been heretofore used,<sup>71</sup> shall remain inviolate forever, but a jury trial may be waived<sup>72</sup> by the parties in all civil cases in the manner to be prescribed by law."<sup>73</sup>

pt. I. lect. VIII. note.) The Code known as "The Duke's Laws," promulgated in 1665—by royal authority bestowed on the Duke of York—provided for a jury of seven members, and for unanimity in capital cases only (Lieber, Civ. Lib., p. 239). So the proposed Fundamental Constitutions of Carolina—drafted by Locke about 1678 and remarkable also for their recognition of religious toleration—made provision for a jury of twelve, whose "verdict shall be according to the consent of the majority."

<sup>69</sup> The jury intended is a common law jury of twelve men. *Wynchaumer v. People*, 13 N. Y. 378.

<sup>70</sup> A statute is not unconstitutional merely because it transfers a class of cases from courts of record, where juries are composed of twelve men, to justices courts, where they consist of six. *Dawson v. Horan*, 51 Barb. 459; *People v. Lane*, 6 Abb. Pr. N. S. 105.

<sup>71</sup> The right to a jury trial extends only to cases in which it had been exercised before the adoption of the original constitution of the state. *Duffy v. People*, 6 Hill, 75; cf. chap. XI. note 18.

<sup>72</sup> In civil cases a jury may be waived and the court may try the issue. *Embury v. Conner*, 3 N. Y. 511, *Gest v. Kenner*, 7 Ohio St. 75 [see N. Y. Code Civ. Proc., §§ 2969, 3006]. Such a waiver is implied, by taking part in an assessment of damages for land taken for public improvement (*People v. Murray*, 5 Hill 468); by receiving the damages awarded (*Heyward v. New York*, 8 Barb. 846); by consenting to a reference (*Lee v. Tillotson*, 24 Wend. 337). So in *United States v. Rathbone*, 2 Paine, 578, it was determined that the right to trial by jury, secured by the Constitution of the United States, was for the benefit of parties litigating in courts of justice, and might accordingly be waived. cf. *Bank of Columbia v. Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559.

But "upon the trial of an issue, raised by a plea of not guilty in the higher grades of crime, it is not in the power of the accused to waive a trial by jury and by consent submit to the facts found by the court, so as to authorize a legal judgment and sentence upon such finding." *Williams v. State*, 12 Ohio St. 622. Vide chap. X. note 42.

<sup>73</sup> In concluding this chapter on the Civil Jury, some reference may properly be made to that branch of it known as the Sheriff's Jury—rather redundantly, for all juries are summoned by that officer, except where the sheriff is a party in interest, in which case the coroner takes his place. It assumes various aspects, and generally officiates *ex parte* or at the instance of only one party (usually the plaintiff) in an action or special proceeding—the sheriff or an under or deputy sheriff customarily

presiding. The following details are more especially applicable to New York, but its general characteristics are the same in the several states.

A Sheriff's Jury is one impaneled by that officer to try the validity of a claim (interposed by a person not a party) of title to, or the right of possession of, goods and chattels seized by him under a warrant of attachment or an execution, issued at the instance of a plaintiff against the defendant in an action. cf. N. Y. Code Civ. Proc. §§ 108, 1418.

It also officiates to determine the compensation to which the owner of real property, required for public purposes, may be entitled (*Id.* § 2108, ff.)—this being really the ancient inquisition *ad quod damnum*—and to assess the damages sustained by the plaintiff in an action of tort or unliquidated damages, where the defendant has failed to enter appearance, or to plead after appearing. (*Id.* § 1219, confirming the common law practice in such cases.)

So the alleged incompetency of a person to manage his affairs, in consequence of lunacy, idiocy or habitual drunkenness (Code Civ. Proc. § 2320) is determinable by a jury of "not less than twelve nor more than twenty-four indifferent persons . . . at least twelve of whom must concur in a finding." (*Id.* §§ 2330, 2331.) Upon the return of the inquisition, the court may either confirm the same or, in a proper case, direct a new trial. (*Id.* § 2336.)

In New York, provision is further made for the impanelment of a jury of twelve persons, to determine the sanity of a person condemned to death (Code Crim. Proc. § 496); while, where another defendant "pleads insanity," the court may, before or during trial or after conviction, order his sanity to be inquired into by "a commission of not more than three interested persons" (*Id.* § 653), or, as the older statute put it, "a doctor, a lawyer, and a gentleman."

While this commission is to report concerning the defendant's sanity "at the time of the commission of the crime" (*Ibid.*) its inquiry is limited to his mental condition at the time of the examination (*People v. Rhinelanders*, 2 N. Y. Crim. Rep. 385); but if, on the whole proof, there is reasonable doubt of sanity, the defendant is entitled to the benefit of that doubt. *People v. Coleman*, 1 N. Y. Crim. Rep. 1; *People v. Casey*, 2 N. Y. Crim. Rep. 137.

See further, as regards the question of insanity, chap. X. final note.

## CHAPTER X.

### GROWTH OF THE CRIMINAL JURY.

It remains for us to consider the establishment of the jury in criminal cases, and to trace its evolution to the duplex form in which it now exists; for formerly the distinction between one jury to accuse, and another body to try the accused, was unknown<sup>1</sup>—this separation not occurring until a later day.

The earliest record of an accusatory tribunal in England exists in a law of the Saxon King Ethelred III., which ordained: "Let a *gemot* [assembly] be held in every *wapentake* [or hundred] and the XII. senior (*yldestan*) thanes go out and the reeve (*gerifa*) with them, and swear on the relic that is given them in hand that they will accuse no innocent man nor conceal any crime."<sup>2</sup> From which enactment it appears, that the

<sup>1</sup>Says Judge Christian: "So little appears to be ascertained respecting the introduction of the trial in criminal cases by two juries, that although it is one of the most important, yet it is certainly one of the most obscure and inexplicable points of the law of England." Note 20 to bk. III. c. 23, of Bl. Com.

An eminent German jurist observes: "The criminal jury"—4. *e.* the body deciding the question of guilt or innocence of an accused—"consisted originally doubtless of the same persons who formed the accusing [now termed the grand] jury. Later, however, a jury was specially summoned and impaneled for rendering a verdict, and the custom arose to reject for this purpose all persons who had already officiated as members of the accusing jury in the case,—which principle of rejection received [in 1851] legislative confirmation under Edward III." Bluntschli's *Staats-Woerterbuch*, vol. IX. 350; *cf. post*, p. 148.

<sup>2</sup> Leg. Ethel. III. 2. For the Latin version, see *Cycl. Pol. Sci.* III. 655.

thanes were the inquisitors of crimes committed within their respective districts.

"The resemblance of the twelve thanes to a grand jury," concludes Palgrave,<sup>3</sup> "is sufficiently obvious; and the principal difference between the Anglo-Saxon echevins [*i. e. scabini*, here thanes] and the modern inquest of the shire seems to have consisted in the greater stability of the ancient magistracy, who . . . held their office for a definite period." While, with reference to their functions and the result of their accusation, another authority<sup>4</sup> writes: "They were to act the part of public prosecutors, and the accused had to clear himself by the usual method of compurgation, failing which he must submit to the ordeal. . . . Later the judicial combat took place where an accuser came forward to make the charge; and compurgation, or the ordeal, where the accusation rested not on the assertion of a single prosecutor but on the *fama publica* of the neighborhood. . . . This office [ofthane-inquisitor] however, seems to have fallen in abeyance, at all events after the invasion of the Normans; and accusations of crime were left to the general voice of the neighborhood denouncing the guilt of the suspected person."

As partially accounting for the disappearance of the accusing thanes, in furnishing a popular substitute for the latter, the existence of the fridbourg or frankpledge system<sup>5</sup> in early England must here be recalled, by which each member of a community was a surety for

<sup>3</sup>English Commonwealth, I. 213.

<sup>4</sup>Forsyth, pp. 194, 198.

<sup>5</sup>Cf. *ante*, chap. VI.; and, as to compurgation as a means of criminal defense, *Id.* note 6, citing extract from Pom. Mun. Law, § 401.

As to "Saxon Tithingmen in America," see a paper by H. B. Adams, Johns Hopkins University (first) series.

every other one's conduct, and thus specially interested in bringing offenders to justice. This led to the introduction of a process termed *Vorath*, which, analogous to compurgation,<sup>6</sup> consisted in a number of free-men jointly supporting a criminal accusation by mutually pledging their oaths to its truth. Since, however, an accusation thus made was simply based on public rumor and made by irresponsible parties, collected at random, and since, moreover, "parties might be fearful or unwilling to make themselves conspicuous as accusers, especially after the introduction [by the Normans] of trial by battle, which compelled them to support their charge by single combat," there arose a popular want for a more efficacious and less hazardous process, which was supplied by the intervention of the legislature. It has before<sup>7</sup> been referred to that the Normans possessed, and had to some extent transplanted to England, certain accusatory bodies termed *jurata delatoria*—which presented offenders for trial before the king's judges, and probably superseded the Saxon tribunals in many parts of the island. Though the number of their members is uncertain, and their functions not clearly defined or regularly exercised, they must have prevailed to a considerable extent during the century succeeding the Conquest and indubitably formed the basis on which subsequent statutory enactments operated. The introduction, too, of the assise at this period, accelerated the fulfillment of the popular wish for an improvement of criminal functionaries.

The first enactment is contained in the Constitution

<sup>6</sup> *Ante*, chap. VII. p. 78.

<sup>7</sup> Forsyth, p. 194.

<sup>8</sup> *Ante*, chap. VIII. p. 96.

of Clarendon — adopted by a parliament of nobles and prelates in 1164, — whereby Henry II. checked the power of the church and narrowed the clergy's exemption from the secular administration of justice.\* One of the causes that led to the death of Archbishop À Becket was the withdrawal of his consent to this statute. This document prescribes in

Cap. VI. : "*Laici non debent accusari nisi per certos et legales accusatores et testes in præsentia episcopi, ita quod archidiaconus non perdat jus suum, nec quicquam quod inde habere debeat. Et si tales fuerint qui culpan-  
tur, quod non velit vel non audeat aliquis eos accusare, vicecomes requisitus ab episcopo faciat jurare duodecim legales homines de vicineto seu de villa, coram episcopo, quod inde veritatem secundum consuetudinem suam manifestabunt.*"<sup>10</sup>

It should be remembered, in this connection and for the better interpretation of the import of this clause, that while the *gerifa* or reeve then "acted as the presiding officer of the hundred court, which met once at least every month and had both civil and criminal jurisdiction . . . the bishop of the diocese had co-ordinate authority with him, and the court had cognizance of ecclesiastical causes, which were entitled to precedence over any other business."<sup>11</sup>

\* Cf. chap. IX. pp. 107, 108, and notes. Brunner (Schw. 800 ff.) refers to this monarch as "the man who first succeeded in forcing the ecclesiastical jurisdiction into narrower limits." But see *ante*, chap. VIII. p. 90.

<sup>10</sup> Thus rendered by Reeves (I. 76): Laymen ought not to be accused except by certain and legal accusers and witnesses, in presence of the bishop, so that the archdeacon may not lose his right, nor anything which should thereby accrue to him; and if the offending persons be such as none will or dare accuse, the sheriff, upon the requisition of the bishop, shall cause twelve lawful men of the vicinage or town to be sworn before the bishop, to declare the truth according to their consciences.

<sup>11</sup> Forsyth, p. 64.

The more direct application, however, of the principle underlying the institution of the assise, or primitive civil jury, to criminal jurisdiction,<sup>12</sup> was accomplished two years later by the assise of Clarendon,<sup>13</sup> which begins with the following enactment:

*"Imprimis statuit prædictus rex Henricus de consilio omnium baronum suorum, pro pace servanda et justitia tenenda, quod per singulos comitatus inquiratur et per singulos hundredos, per XII. legaliores homines de hundredo et per IV. legaliores homines de qualibet villata, per sacramentum quod illi verum dicent: si in hundredo suo vel villata sua sit aliquis homo qui sit rellatus vel publicatus quod ipse sit robator vel murdrator vel latro vel aliquis qui sit receptor robatorum vel murdratorum vel latronum, postquam dominus rex fuit rex. Et hoc inquirant Justitiæ coram se, et vicecomites coram se."*<sup>14</sup>

<sup>12</sup> Dr. Walther states: "Investigations have well settled that the civil jury . . . is older than the jury for the decision of criminal cases, and that the latter was formed by analogy from the other." Bluntschli's *Staats-Woerterbuch*, IX. 346.

The reverse was the case with the quasi-jurymen of Rome and Greece, who primarily officiated in criminal trials only.—*Vide* chap. II. and chap. III. *ante*.

<sup>13</sup> This act of A. D. 1166 is characterized by Stubbs (*Select Charters*, p. 140) as "a document of the greatest importance to our legal history . . . introducing changes into the administration of justice, which were to lead the way to self-government at no distant time"—*i. e.* by *Magna Charta* in 1215. The Canon then proceeds to maintain that the knights (*milites*, cf. chap. IX. note 16), who nominated the recognitors, are the origin of county representatives; and that the necessity of the sheriff, when taking personal property, to have some basis of valuation, first introduced the jury system as a machinery of assessment.

<sup>14</sup> *Assisa de Clarenduna*, § 1.

TRANSLATION: In the first place the aforesaid King Henry, with the advice of all his barons, for the preservation of peace and the maintenance of justice has ordained, that inquiry be made in each county and in each hundred, by twelve lawful men of the hundred and four lawful men of every township—who are sworn to say truly whether in their hundred or township there is any man accused of being or notorious as a

By virtue of this clause, writes Stubbs, "twelve lawful men of each hundred, with four lawful men from each township, are sworn to present criminals or reputed criminals of their district, in each county court; the prisoners so presented being sent at once to the ordeal." In this case, Henry simply utilized the machinery that had existed at least since the time of Edgar," and has been outlined in the previous part of this chapter, "but he adapted it to the principle of recognition; the twelve lawful men are witnesses, as they were under the older system"—*e. g.* the *vorath* and its later modifications or substitutes—"but the process is an inquest under oath, as in the case of the great assize."<sup>17</sup> And it has been well observed that "the accusation by the *commune comitatus* was nothing more than the knowledge of the neighborhood (*verdictum vicineti*), which was constantly invoked to decide questions of disputed right, applied to criminal cases, and the statutes of Clarendon merely threw the responsibility upon a smaller number."<sup>18</sup>

The third pillar in the institution of the criminal jury was the Assise or Statute of Northampton, passed 1176, and already referred to in connection with the es-

robber or a murderer or a thief, or anybody who is a harbinger of robbers or murderers or thieves, since the king began to reign. And this let the justices and the sheriffs inquire, each [officer] before himself.

<sup>17</sup> Select Charters, pt. I. Similar accusatory juries were prescribed in the Inquest of Sheriffs (1170) and the Assise of Arms (1181).

<sup>18</sup> " . . . *captatur et eat ad iudicium*":—Assise de Clarenduna, § 2.

<sup>19</sup> The writer thus continues: "From the double character of judge and witness the grand-jury system historically descends; the permission to traverse the verdict of the grand jury by a new inquest is of later introduction, and is adopted as a consequence of the abolition of the ordeal in the reign of Henry III." See *post*, note 24.

In England, the jury of presentments for the Liberty of the Savoy (anciently a sanctuary and still a court with peculiar privileges and procedure) consists of sixteen members, like the grand assise.

<sup>20</sup> Forsyth, p. 197.

tablishment of the assise and civil jury.<sup>19</sup> This contained the following provision :

*“ Si quis retatus fuerit coram justitiariis domini regis de murthero vel latrocinio vel roberia, vel receptatione hominum talia facientium, vel de falsoneria vel iniqua combustione, per sacramentum duodecim militum de hundredo—et si milites non adfuerint, per sacramentum duodecim liberorum legalium hominum—et per sacramentum quatuor hominum de unaquaque villa hundredi, eat ad iudicium aquæ, et si perierit alterum pedem amittat.”*<sup>20</sup>

By this statute, therefore, the preceding enactments were re-affirmed ; with the definite prescription, however, that a person duly indicted by the twelve and thereupon failing to clear himself by the ordeal, was to suffer the loss of one of his limbs.

This was the status of the institution at the death of Henry. The next step was taken by Richard I., whose Ordinance of 1194 provided for the choice of four sworn knights (*milites*) in each county or shire, who in turn were to choose two for each hundred therein ; the latter two again selected (by co-optation) ten more out of their respective hundred ; and the dozen so chosen constituted the body of presentment for their district. “ The plan,” writes Stubbs,<sup>21</sup> “ partly resembles that used for

<sup>19</sup> *Ante*, chap. IX. pp. 107-109.

<sup>20</sup> TRANSLATION: If anybody be accused before the king's justices of murder or theft or robbery, or of harboring men committing these offences, or of forgery or arson, by the oath of twelve knights of the hundred—and if there are no knights, upon the oath of twelve free and lawful men—and by the oath of four men of each township in the hundred, let him be subjected to the ordeal by water, and, if he fail therein, suffer the loss of one foot.

<sup>21</sup> Stubbs, *Select Charters*, 27; Rog. Hovenden, 423. cf. chap. IX. note 14. “These recognitors were obviously witnesses,” says Stephen (*Hist. Crim. Law*, I. 256) “as appears from the account given of their proceedings” by Glanville, c. 17.

the nomination of recognitors for the grand assize, and was likewise a check on the power of the sheriff, to whom the nomination seems to have before belonged." In the time of Edward I., however, this privilege was restored to that officer, for it appears that then each bailiff, in anticipation of the advent of the justices in eyre, was to choose four knights, by whom were selected *duodecim de melioribus hominis* of the bailiwick, to present under oath to the justices the names of all criminal offenders." These twelve "in consequence of the oath which they took . . . were called the *jurata patriæ* . . . and for a long time seem to have united the two functions of a grand jury to accuse, and a petit jury to try the accused."<sup>22</sup>

The trial of an accused person by the grand jury itself, though objectionable for uniting in one body the functions of accuser and trier, was certainly preferable to that dangerous and dubious mode of vindication, the ordeal, and probably prevailed in the last quarter of the twelfth and in the first quarter of the thirteenth century. Earlier already, as a result of the Statutes of Henry II., "the adoption of presentment and ordeal had the effect of abolishing the practice of compurgation in the shire-moots. . . . The ordeal in these circumstances, being a resource following the verdict of a [grand] jury acquainted with the fact, could only be

<sup>22</sup> Fleta, I. c. 19.

<sup>23</sup> Forsyth, p. 198.

In another place (p. 214) the same authority observes: "These jurors were the representatives of and substitutes for the *fama patriæ*, or public rumour, by which in old times when a man was assailed he was said to be *male creditus*, and was thereupon arrested and put upon his trial. . . . For some time there appears to have been no distinction between this accusing jury and the trying jury." cf. *ante*, p. 135.

applied to those who were to all intents and purposes proved to be guilty. The abolition of the ordeal by the Lateran Council in 1215 [the year of Magna Charta]<sup>24</sup> and the impossibility of securing perfect justice<sup>25</sup> by the machinery of the grand jury, led the way to the usage of a second [the petit] or trial jury, to traverse the decisions of the former."<sup>26</sup>

In the reign of John we first begin to trace the use of juries—i. e. petit juries—for the trial of criminal accusations.<sup>27</sup> At first it seems to have been procured by the accused as a special favor from the crown, a fine, or some gift or consideration, being paid in order to pur-

<sup>24</sup> "The immediate external impetus for the reform was given by the Fourth Lateran Council of Innocent III. by which the clergy was directly forbidden, with express reference to the previous prohibition of the duel, from participating (as was its custom) in the ceremonial of the ordeal. . . . It became necessary, therefore, to devise a substitute for the ordeals, which would provide the accused with other means for defending himself and proving his innocence. . . . Hence we already in 1221 meet with an institution analogous to the civil jury, so that in cases, to which heretofore the ordeal was applicable, the guilt or innocence of the accused was decided by the verdict of twelve sworn men of the vicinage (*verdictum patris*)."<sup>28</sup> Bluntschli, *Staats-Woert.* IX. p. 349. Stephen, (*Hist. Crim. Law*, I. 253, note) instances a case as late as 1679, when Gavan, one of the five Jesuits involved in the Popish Plot, offered "to put himself upon the trial of ordeal." *Whitebread's Case*, 7 How. St. Tr. 383.

<sup>25</sup> Hence the ancient legists with great solemnity invoke the judges to "take good heed in inquisitions touching life and limb, that they diligently examine the jurors from what source they obtain their knowledge, lest per adventure by their negligence in this respect Barabbas should be released and Jesus be crucified." Bracton, III. c. 18; Fleta, I. c. 31.

On the other hand, it is reported in a curious old case that "the jurors acquitted a prisoner contrary to the evidence, and for that they were fined and imprisoned, and bound for the good behavior of the prisoner during his life." *Wharton's Case*, Noy, 48. [Contrast herewith p. 150.]

<sup>26</sup> Stubbs, *Select Charters*, 142. But not without weighty antagonism. Thus we read in the *Mirror of Justices* of Andrew Horne, fish-monger and town clerk of London: "It is an abuse that the justices drive a true man to be tried by the country, when he is ready to defend himself . . . by battle."

<sup>27</sup> Palgrave, *Eng. Com.* II. 186; cf. Bracton, 143 ff.

chase the privilege of a trial by jury. Art. 36 of Magna Charta declared that such writs shall no longer be sold, but be of right. It appears from Bracton and Fleta<sup>28</sup> that at the end of the thirteenth century the trial by jury in criminal cases had become usual,<sup>29</sup> the form of the proceeding being given by them in detail.

Thus, in a case reported in the Year Books in 1302 (30 & 31 Edw. I. 528)—ten years after the oldest one extant—a stable keeper had been kicked to death by the horse of one John, and the latter was duly put to trial, charged with burying the stabler without a coroner's inquest and with retaining possession of the horse, although it had become a "*deodand*"—which was the designation anciently given to a chattel that had immediately caused the death of a person, and was deemed forfeited to the crown for pious uses. The accused denied both charges and put himself on the *jurata patriæ* for trial. Both parties were represented by counsel. Several challenges were made, and—in accordance with a very early custom, long and tenaciously adhered to,—tried by the unchallenged jurors (*triebantur per residuos de duodecim*): which practice is worthy of note, because the jurors so examined as to their competence are the

<sup>28</sup> "In the time of Bracton . . . the appellee had the option of either fighting with his adversary, or putting himself upon his country for trial (p. 202) . . . At first . . . the accused was not entitled to it as a matter of right, but rather by the king's grace and favor, to be purchased by the payment of a certain sum of money or a gift of chattels." (p. 200). Forsyth, Trial by Jury. In the King's courts, compurgation (5 Harv. L. Rev. 263, 265) is said to have been done away with by the Assise of Clarendon.

<sup>29</sup> A curious exception to the right of trial by petit jury existed, at common law, in cases of secret poisoning, where the accused was usually obliged to defend himself by combat—"because," says Bracton (bk. III. c. 18) "the country can know nothing of the fact."

earliest instance of witnesses publicly testifying before a jury, and the practice supplied a precedent for permitting the testimony of other witnesses to be similarly heard at a later period. The judge's quaint charge to the jurors—who were then wont to be addressed, "good people" (*boni homines*)—is preserved: "If W. died from the kick of the horse, the horse would be *deodand*. If not, it would be John's. If the King should lose through you what rightly belongs to him, you would be perjured. If you should take away from John what is his, you would commit a mortal sin. Therefore, by the oath you have made, disclose and tell us the truth, whether the said W. died of the horse's kick or not. If you find that he did, tell us in whose hands is the *deodand* horse and what he is worth; and whether the said W. was buried without a view of the coroner." The record of this case leaves it in doubt, whether the accusing and the trying jury consisted of the same individuals, or were separate and distinct bodies.

The causes that led to the gradual extension of the system of recognitions to criminal cases, and the institution of the criminal jury, have been most ably traced and treated by Brunner,<sup>20</sup> and his account may be summarized as follows: The legislation of Henry II.—heretofore set forth—provided for recognitions in civil cases and for juries of accusation [grand juries], but not for criminal triers. As has been seen, however, a practice arose, early in the thirteenth century, to allow an accused (for a consideration) a jury in criminal cases, whenever he *asked* for it. About the same time, the fourth Lat-

<sup>20</sup> Schwurgericht 869-375 *et al.* cf. Forsyth, Trial by Jury, 214; Stephen, Hist. Crim. Law, I. 253, 254.

eran Council, by forbidding the participation of ecclesiastics in ordeals, drew the ground from under that mode of trial. With the law so unsettled, the judges when next proceeding—on eyre—to their respective jurisdictions, were in 1219, by a 'temporary ordinance' of the King's council (Palgrave, Eng. Com. I. 266) vested with large discretionary powers "to act wisely according to the special circumstances of each case . . . with persons accused of crime," and to clap in prison (pending trial) those most seriously accused, but not so as to imperil life or limb. Reluctant to encourage trial by duel, the judges naturally turned to the inquest as the only available alternative. Having once decided on this expedient, it was not long left to the option of an accused to be thus tried or otherwise. Inasmuch as the jury was treated as a substitute for the ordeal—which a homicide taken in flight (Glanv. XIV. cc. 3, 6) or one sixty years old or a woman or maimed (Bract. III. cc. 21, 22) had always been compelled to undergo against his will—the judges now, analogously, sometimes forced a jury on an unwilling prisoner (*cogendus quod se defendat per patriam*) and several persons were thus convicted and hanged.

The recusation of jury trial by an "appellee" (as the accused was then technically termed, the prosecuting witness being the "approver" or appellant) arose of course not "from love of the common law"—to which cause Blackstone (Com. bk. I. c. 15) delicately attributes the reluctance of "the lower rank of" Englishmen to relinquish "their ancient privilege" of wife-beating,—but from well-founded apprehension that, if his record was malodorous or the evidence of his guilt reasonably

certain, he stood little or no chance to clear himself (*se purgare*) by "the country" (who were liable to be punished for an unwarranted acquittal) but might escape by hazarding himself in battle (*per duellum*), or waging his law (*vadiare legem*).

One method of judicial compulsion, which prevailed to the middle of the thirteenth century, was to treat an accused as confessing, if he refused to be tried by jury. This seems to have been based on a sort of forced analogy with the practice—referred to in Bracton's Note Book (II. cas. 136, 138, 1724)—of hanging without any trial at all criminals taken in the act; the court holding that in such cases *non est opus alia probatione*, and adjudging *non potest defendere, suspendatur* ["Being unable to defend himself, let him be hanged!"]

But these irregular practices were not long countenanced. In 1275, the Statute of Westminster I. (3 Edw. I. c. 12) was enacted, providing that "notorious felons . . . who will not put themselves on inquest for felonies . . . shall be put in strong and hard imprisonment as refusing the common law of the land." This impliedly recognizes the necessity of consent, but expressly prescribes the *peine forte et dure* as a penalty for refusing to be tried by a jury, or for declining to plead guilty ("standing mute") to the charge.

The character of this alternative may be gathered from Blackstone: "The English judgment of penance for standing mute was as follows: that the prisoner be remanded to the prison from whence he came; and put in a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of

iron as he could bear, and more; that he have no sustenance, save [on alternate days] . . . three morsels of the worst bread, and . . . three draughts of standing water . . . ; and in this situation" the prisoner should remain "*till he died* or (as anciently the judgment ran) *till he answered.*" And such penance was imposed "without any distinction of sex or degree," after a prisoner had been thrice admonished and informed of his fate in court, and, after all, was allowed the benefit of clergy: "thus tender was the law of inflicting this terrible punishment." (Com. bk. IV. c. 25.) More harrowing details may be found in Pike's History of Crime in Eng. (vol. II. pp. 194, 195, 283-285). And in the face of all this, Sir Edward Coke (Inst. I. fol. 976) blandly proclaims: "The law is the perfection of reason." Yet these barbarous practices—endured by many persons, often innocent, but apprehensive of a miscarriage of justice, in view of the fact that one not formally adjudged guilty did not forfeit his lands to the crown,—were indulged in England from about 1300 to 1772, when it was provided (by stat. 12 Geo. III. c. 20) that all persons who, on their arraignment for felony or piracy shall stand mute or not answer directly to the offense, shall be held convicted as if by verdict or confession, and judgment and execution shall be awarded accordingly. Finally, in 1827, the rules that had been advocated by Bracton, and to some extent followed by the courts, five centuries ago, were enacted into law by stat. 7 & 8 Geo. IV. c. 28, as follows: "If any person, not having the privilege of peerage, being arraigned upon any indictment for treason, felony or piracy, shall plead thereto a plea of guilty, he shall by such plea . . . be deemed to put himself

upon the country for trial" (§ 1); and if such person stands mute of malice, or will not answer directly to the charge, a plea of not guilty may be entered for him, and the plea so entered has the same effect as if the prisoner had actually pleaded (§ 2). "This is also," says Chase (Bl. Com. note to p. 1017) "the general practice in the states of this country."

In the reign of Edward III., the separation of the grand and petit jury was an established factor in English criminal jurisprudence, Statute 25 Edw. III. c. 3 providing (A. D. 1352) that "no indictor shall be put in inquests upon deliverance of the inditees of felonies or trespass, if he be challenged for such cause by him who is indicted." In other words, no grand juror could also act as trial juror in the same case, if objected to by the accused. After the various enactments enumerated and changes referred to, it was only a question of time to dispense with the service of the knights who acted as elisors, and by a precept of the court directly to authorize the sheriff of each county to return the name of twenty-four or more persons from whom the grand jury is chosen—which number gradually settled to twenty-three (or one less than two full petit juries), a majority of whom must consent in order to frame a valid indictment; whence it became the custom that, however many attend or actually officiate, twelve at least must concur in presenting an offender.<sup>21</sup>

<sup>21</sup> Thus, by the statute of New York, a grand jury must consist of not less than sixteen nor more than twenty-three members, and (in any case) twelve must concur in order to frame a valid indictment. In Massachusetts, the limits are thirteen and twenty-three respectively. Its province is to determine whether indictments shall be brought against alleged criminal offenders.

According to Hargrave (1 State Trials, 407) anciently, and especially in the reign of Henry VIII.—Carlyle's "Hateful Harry"—when the influence of the crown was at its zenith, "to be accused of a crime against the state and to be convicted, were almost the same thing."

A conspicuous exception to this rule was the case of Sir Nicholas Throckmorton (*Id.* 869) tried in 1554 for high treason, and who conducted his own defense with consummate skill, energy, and presence of mind; for the common law right of a party to appear by counsel did originally not extend to treason or felony—on the singular assumption that the judges (the creatures of the crown) would amply advise and protect the prisoner, and the curious reasoning that if he were guilty he ought not, and if innocent need not, have professional advice.

As a matter of fact, in this case, as was the rule in those days, court and prosecution combined to contrive the conviction of the prisoner "by persuasions, enforcements, presumptions, applying, implying, inferring, conjecturing, deducing of arguments, wresting and exceeding the law, the circumstances, the depositions and confessions." *Ibid.*

But the jury was made of sterner stuff than usual, and after deliberating two hours, acquitted the prisoner. Bromley, Lord Chief Justice, then descended to the level of remonstrating with them, but in vain; and (whereas Griffin, Attorney General, had asked that each juror be bound in the sum of £500 "to answer to such matters as they shall be charged with in the Queen's behalf") the court went to the extreme of emphasizing

its dissatisfaction with the verdict by committing the jury to prison."

Finally "eight of them (four having submitted and apologized) were brought before the Star Chamber in October (six months and more after the trial) and discharged on the payment by way of fine of £220 apiece, and three, who were not worth so much, of £60 apiece." (Stephen, Hist. Crim. Law, c. XI.) The fine of the foreman and another juror had at first been fixed at £2000.

It is worthy of note that the reverse of this procedure sometimes occurred. Thus Sir Thomas Smith (temp. Elizabeth) mentions a jury whose members were both imprisoned and heavily fined for convicting a defendant of treason *contra plenam et manifestam evidentiam*. (Eng. Com. III. c. I). Another notable acquittal was that of the Seven Bishops in 1688 (12 St. Tr. 183-431), the verdict wherein finally vindicated the independence of the Church of England from pontifical supremacy.

"Introduced originally as a matter of favor and indulgence," the jury thus "gained ground with advancing civilization, gradually superseding the more ancient and barbarous customs of battle, ordeal, and wager of law, until at length it became, both in civil and criminal cases, the ordinary mode of determining facts for judicial purposes."<sup>32</sup>

<sup>32</sup> Bunyan may have had such practices in mind, when (in the first part of *Pilgrim's Progress*, pub. about 1675) Lord Hategood, who presides at the trial of Faithful, thus harangues the prisoner: "Thou runagate [renegade] heretic and traitor, hast thou heard what these honest gentlemen"—namely, Envy, Superstition and Pluckthank,—“have witnessed against thee?” And again: “Sirrah, sirrah, thou deservest to live no longer, but to be slain immediately upon the place; yet that all men may see our gentleness toward thee, let us hear what thou, vile runagate, hast to say.” For the names of the jurors, *vide* chap. XII. end of note 55.

<sup>33</sup> Macclellan, Eng. Cycl. III. 26.

In the dual form whose growth we have described, the criminal jury existed in the American Colonies of England from the first establishment of an organized government among them; for this, like the civil jury and other political institutions of the motherland, was regarded by the English settlers on the Atlantic coast as an invaluable heritage, and thus firmly established as a juridical factor long before the rise of the United States. In the Declaration of Independence, George III. is arraigned because "he has combined with others, to subject us to a jurisdiction foreign to our [colonial] constitutions, and unacknowledged by our laws; giving his assent to their acts of pretended legislation . . . for depriving us, in many cases, of the benefit of trial by jury." The framers of the Constitution, too, must have looked upon it as an institution which should be preserved while society exists"—and not as one which (as they said of the civil jury) changes in society may cause to be superseded by different modes of trial."

Accordingly while, as has before been noted, the body of the Constitution contains no provision relative to the perpetuation of the civil jury, a section in that document explicitly prescribes that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said

<sup>24</sup> Says Pomeroy: "The grand jury, carefully preserved by our National and state constitutions, appears to be an invincible barrier against official oppression, by making the private citizens themselves the originators of all important accusations; the indictment is a safeguard against unfair concealment and surprises on the trial; while the jury, who must pass upon the questions of guilt or innocence, being drawn from the people, will naturally strive at once to preserve the law inviolate and shield the prisoner from injustice." *Mun. Law*, § 215.

As to Grand Jury in United States, cf. Burgess, *Pol. Sci. I.* 187, 188.

<sup>25</sup> Cf. chap. IX. p. 120.

crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."<sup>26</sup> And, to make assurance doubly sure, this provision was by constitutional amendment elaborated as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."<sup>27</sup>

Corresponding provisions were embodied by the various states in their constitutions, of which that of New York,<sup>28</sup> being particularly full and explicit, may be quoted as representative of all: "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service; and the land and naval forces in time of war, or which this state may keep with the consent of Congress in time of peace; and in cases of petit larceny," under the regulation of the legislature) unless

<sup>26</sup> U. S. Const. art. III. §§ 2, 3.

<sup>27</sup> U. S. Const. Amendment VI.

<sup>28</sup> N. Y. Const. art. I. § 6.

<sup>29</sup> A seeming exception to the constitutional guarantees of trial by jury exists in the statutory provisions of the various states, prescribing the trial of cases of larceny, vagrancy, idleness, profanity, inebriety, disorder or riotous conduct, before and by justices of the peace and police magistrates. Such statutes are held to be constitutional, though they dispense with trial by jury; since they simply tend to continue and perpetuate a practice prevailing at common law from time immemorial. *Duffy v. People*, 1 Hill, 355, 6 Hill, 75; *People v. McCarthy*, 45 How. Pr. 97.

on presentment or indictment of a grand jury; and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. No person shall be subject to be twice put in jeopardy" for the same offense; nor

But this power of conviction without a jury cannot be extended to classes of cases other than those in which it has been ordinarily and customarily employed. *Wynhamer v. People*, 13 N. Y. 378; *Hill v. People*, 20 N. Y. 363; *Baldwin v. New York*, 42 Barb. 549.

The course of procedure prescribed by these statutes must be strictly observed. *Beadleston v. Sprague*, 6 Johns. 101. cf. Stat. 42 and 43 Vict., cap. 49.

Similarly, deserters from the Federal army or navy are not entitled to trial by a jury, but are subject to the summary process and Draconic methods of military law.

In connection with these summary proceedings, reference may be made to the causes, for which the superior courts exercise their power of punishing contempt, by an attachment of the person, so far as jurors are concerned. The offenses that render them amenable to this disciplinary power, as enumerated by Blackstone, are: "Those committed by jurymen, in collateral matters relating to the discharge of their office; such as making default when summoned, refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party [cf. chap. XII. p. 190]; and other misbehavior or irregularity of a similar kind; but not in mere exercise of their judicial capacities, as by giving a false or erroneous verdict." Bl. Com. c. XX.

This power to punish for contempt any person, guilty of wilful disobedience to its lawful mandate or offending its dignity by misconduct in open court, is an inherent prerogative of the judiciary.

<sup>40</sup> But a prisoner is not "put in jeopardy," where the indictment was too defective to sustain a valid judgment. *Canter v. People*, 1 Abb. App. Dec. 305 (construing 2 N. Y. Rev. Stat. 701, § 24). Nor was this a bar at common law. *Russell, Crimes*, 836; *People v. Barrett*, 1 Johns. 66. So, in case of disagreement, the jury may be discharged by the court and the accused subjected to a new trial. *People v. Goodwin*, 18 Johns. 187; *People v. Reagle*, 60 Barb. 527.

A new trial, however, cannot be granted where the accused has been acquitted of a felony. *People v. Comstock*, 8 Wend. 549. Nor will a writ of error lie, at the suit of the people, after judgment for the defendant in a criminal case. *People v. Corning*, 2 N. Y. 9. cf. *Rea v. Jones*, 8 Mod. 201 (decided 1724).

A prisoner sentenced upon a regular trial and conviction, cannot be re-tried. *Shepherd v. People*, 26 N. Y. 406. cf. *Ratzky v. People*, 29 N. Y.

shall he be compelled in any criminal case to be a witness against himself;<sup>41</sup> nor be deprived of life, liberty, or property without due process of law."<sup>42</sup>

Concerning the (criminal) jury in other countries, where it has been adopted in imitation and emulation of

124; *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506; and *vide* Hare's Am. Const. Law, 565-571, for a general consideration of the interpretation given to the phrase "twice put in jeopardy" and kindred questions.

But conviction for assault and battery is no bar to indictment for murder, where the person assaulted subsequently dies of the blows. *Burns v. People*, 1 Park. Crim. Rep. 182. Where a conviction is reversed at the suit of the prisoner, a new trial may be ordered. *People v. Ruloff*, 5 Park. Crim. Rep. 77.

<sup>41</sup> An act requiring parties to make discovery on oath concerning an indictable offense, but forbidding the answers from being used in evidence against said parties, is constitutional. *Perrine v. Striker*, 7 Paige 598; 4 L. ed. 233. Nor is a person protected from testifying in a criminal case against another, on the ground that his testimony may tend to implicate him in a crime, provided he is protected by statute against the use of such testimony on his own trial. *People v. Kelly*, 24 N. Y. 74. A prisoner, by offering himself as a witness, may waive the constitutional privilege. *Connors v. People*, 50 N. Y. 240.

<sup>42</sup> "Due process of law" simply requires that a party shall have his day in court; the legislature may take away a particular remedy and give a new one. *People v. Essex County Suprs.* 70 N. Y. 223. However, a trial by twelve jurors can not legally be waived by the prisoner in a criminal case. *Cancemi v. People*, 18 N. Y. 128. [See also, in this connection, chap. XI. note 18.]

In the interesting case of Michael Cancemi, which was tried in 1858, one of the jurors was allowed to withdraw and the trial to proceed with the remaining eleven, by the express consent of the prisoner, made in open court. The prisoner applied to the general term of the supreme court for arrest of judgment, claiming that he had been tried and convicted "by a tribunal unknown to the common law and the Constitution;" but the court (per Davies, P. J.) announced to the prisoner that, since "it appears that one of the jurors was withdrawn at your own request and for your own benefit, and at your request the trial proceeded with the remaining jurors—we think, therefore, that under these circumstances . . . it is our duty to proceed and pronounce judgment."

Defendant's counsel then carried the case to the court of appeals, and submitted:

"That in civil cases, the right of a party interested to waive the forms of law, and with these trial by jury, is expressly conceded by the constitution [of New York]. . . .

the English system, a few observations may here be added.

In the sister country, Scotland, the jury system existed from an early date through the influence of English precedent and was re-affirmed by appropriate legislation after the union of the two countries in 1603. In criminal cases, the jury has always consisted of 15 persons, a *majority* of whom is sufficient to convict. A civil jury "was reintroduced into Scotland by 15 George

That in *criminal* cases, particularly felonies, there can be no waiver of a trial by jury, and a party capitally accused cannot submit his case to arbitration, or to any other tribunal than one expressly created by law to try it; nor can the said tribunal be constituted in any other manner than that ordained by law; hence, when the law prescribes that an accused shall be tried by twelve men, he cannot bargain that he shall be tried by five, or ten, or by the judge, without the intervention of any jury at all."

Among the authorities cited in support of this position, were the following:

"The petit jury must consist precisely of twelve, and is never to be either more or less, and this fact it is necessary to insert upon the record; if, therefore, the number returned be less than twelve, any verdict must be ineffectual, and the judgment will be reversed for error." 1 Chitty, *Crim. Law* 505.

"Twelve jurors must appear on the record to have rendered their verdict, otherwise it is error." Per Mansfield, *J.*, in *Rea v. St. Michael*, 2 W. Bl. 719.

"If only eleven jurors be sworn by mistake, no verdict can be taken of the eleven; and if it be, it is error." 2 Hale, P. C. 296.

"If one of the jurors be sick, so that he cannot deliberate, and a verdict be taken, it is the verdict of the other eleven and will be set aside." *Den v. Baldwin*, 3 N. J. L. 501.

"Judgment was arrested, where it appeared that a case had been tried by thirteen jurors." Wharton, *Crim. Law* (1848) 618; *State v. Fort*, 1 N. C. Law Repos. 510; *Whitehurst v. Davis*, 2 Hayw. (N. C.) 118. In the last case, *per curiam*: "It may be said, if thirteen concur in a verdict, twelve must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode," must be discountenanced.

"A jury must consist of twelve men—no other number is known to the law." *Dixon v. Richards*, 2 How. (Miss.) 771. See to same effect *Jackson v. State*, 6 Blackf. 461; *Rose v. State*, 20 Ohio, 31; *Work v. State*, 2 Ohio St. 296; *Carson v. Com.* 1 A. K. Marsh. 290.

III. c. 42, in a special court established for the purpose," but subsequently abolished."

Since 1815, it consists of twelve men, who curiously enough (in contradistinction from the criminal body) were required to be unanimous, until a statute<sup>43</sup> passed in the reign of the present sovereign prescribed that the verdict of three fourths is to be considered that of the whole body.

In Ireland, and in almost all the colonies of Great Britain, the jury exists substantially as in the mother country."

In Portugal, the number of the jury was limited to six (by Act of 1838) while a verdict must receive the assent of at least two thirds, leaving it still incumbent on the judge (if he deem it incorrect) to annul it and refer the question to another jury."

In Belgium, trial by jury for all criminal and political

In accordance with these tenets, the judgment of the general term was set aside, the court of appeals holding substantially that (as submitted by defendant) the law permits a waiver of trial by jury in *civil* cases, because this concerns only private interests; but it allows no bargain or stipulation of individuals to affect "the cherished and great principle of trial by jury in *criminal* cases, which prescribes a *known, certain, uniform, and permanent* rule, that neither legislators, judges, nor citizens can transgress, alter or infringe."

<sup>43</sup> *Cycl. Pol. Sci.* II. 660. Before 1850, there was practically no oral argument in the Scotch courts, litigation being almost entirely conducted by means of written pleadings and briefs, called "minutes of debates."

<sup>44</sup> 22 & 23 *Vict.* c. 7.

<sup>45</sup> *Cycl. Pol. Sci.* II. 660. In Wales the jury originally (by a special statute of Henry VIII.) consisted of six; whereas a Cornish custom to the same effect was (in 1852) declared bad.

By recent legislative changes, juries of five have been introduced in the English county courts—an innovation of problematical value.

<sup>46</sup> Forsyth, c. XVI. But a more recent authority—H. Morse Stephens, art. *Portugal*, in *Encyclopædia Britannica*—does not mention the existence of a jury in Portugal.

charges, and for offenses of the press, has been constitutionally guaranteed ever since its separation from Holland."

It was introduced in 1834, and guaranteed by the constitution of 1844, in Greece—whose legal system is based on that of Bavaria, the first king (Otho) having been of the house of Wittelsbach."

Italy also provides for trial by jury in criminal causes, a majority being sufficient to convict; "but there seems good reason to question the fitness of a large part of the population for the exercise of the functions. . . . 'Not guilty, with extenuating circumstances' is an amusing but suggestive verdict."

In Sweden, a jury "is never summoned except in cases affecting the liberty of the press;" but in the country districts there is a curious tribunal, "consisting of a judge and seven to twelve assessors elected by the people, who, if they are unanimously of an opinion different from that of the judge, can outvote him." This form of jury has existed there for many centuries; a verdict is given by one half of its members, or any greater number, and the judge; while, when the majority is opposed by a minority and the judge, a new trial must take place."

In Norway, trial by jury in criminal cases was estab-

<sup>47</sup> Enc. Brit. III. 516.

<sup>48</sup> *Id.*, XI. 85.

<sup>49</sup> *Id.*, XIII. 462. But see *Morehead v. Brown*, 35 N. Y. S. R. 766, where, in an action brought by overseers of the poor, to recover a penalty for selling hard cider without a license—the intelligent jury returned, and the appellate court sustained,—a verdict: "We find the defense of two offenses, fifty dollars each."

<sup>50</sup> *Id.*, XXII. 743.

<sup>51</sup> Yeaman, *The Study of Government*, c. XIII.

lished by law dated July 1, 1887. A majority may render the verdict.

In Russia, the judicial system established by ukase in 1864—well conceived but poorly executed—provides for elective justices of the peace who decide all controversies involving less than 500 roubles (about three hundred dollars) and all cases of crime punishable by less than six months' imprisonment. "All criminal cases involving severer penalties are tried by juries, whose verdicts can be set aside only by a court of cassation, but are not respected in cases having a so-called 'political' aspect. Political offenses are tried by tribunals composed *ad hoc*." <sup>52</sup>

In Switzerland, all crimes against the confederation must be tried by jury. The trial of other crimes depends on the law of each canton. In Geneva, for instance, a jury exists, which may render a verdict of 'guilty under extenuating circumstances' or guilty 'under very extenuating circumstances.' <sup>53</sup>

And the same authority states that the jury system is in vogue in all the South American states—in criminal cases—their civil jurisprudence being based on the Roman law.

It also prevails in the Hawaiian Islands, whose laws provide for a jury of twelve in both civil and criminal cases, nine of whom may render a verdict.

In France, <sup>54</sup> no civil jury or grand jury exists; while

<sup>52</sup> Enc. Brit. XXI. 71.

<sup>53</sup> Cycl. Pol. Sci. II. 660.

<sup>54</sup> Already in 1789, Sieyès, in his celebrated treatise, 'Qu'est ce que le tiers-état?' said: *Le jugement par jurés est le véritable garant de la liberté individuelle en Angleterre et dans tous les pays du monde, ou l'on aspirera à être libre.*

in criminal cases, jury trial is constitutionally guaranteed in cases of felony only. It was originally established by decree of the Constituent Assembly, September 16, 1791. The trial jurors now "must vote by secret ballot, and if they find the prisoner guilty by a bare majority, they must state this in their verdict. A similar operation must be gone through with on the questions, whether there are extenuating or aggravating circumstances; whether the fact admits of legal excuse; or whether the prisoner was competent to distinguish right from wrong when he committed the act." "

The French in 1791 introduced the criminal jury into the Rhenish provinces, which they occupied and maintained throughout the Napoleonic era, thus familiarizing the Germans with the institution. It became so popular that thereafter the Prussian government concluded to tolerate the institution, and confirmed its establishment by royal decree in 1819; though in Prussia proper it received no foothold until Frederick William IV. promulgated the law of January 3, 1849, as one consequence of the revolution of 1848. "But political offenses were withdrawn from its operation in 1851." "

It was constitutionally recognized by Bavaria and Hesse in 1848, by Wurtemberg and Baden in 1849, and by Austria in 1850. In the latter country felonies only are triable by jury, and eight must concur in order to convict.

In Prussia, there was no jury of accusation, corresponding to our grand jury, but the public prosecutor for the district presented offenders to the court. The

" Forsyth, c. XV.

" Cyel. Pol. Sci. II. 660.

trial jury consisted of twelve, who might give a verdict by a majority; in case of a bare majority, however, the court could decide; and where the court was satisfied that a verdict of guilty was erroneously given, it could annul and order a new trial."<sup>57</sup>

When the adoption of an imperial code for the new Empire was pending, Prussia first proposed the substitution of trial by a judge and assessors, but finally it was guaranteed in all criminal cases "except treason, political crimes, and offenses of the press."<sup>58</sup>

The German bar association, at its session of 1879, discussed at some length the advisability of transplanting the English civil jury to Germany, but deemed it inexpedient—the prevailing opinion being that the change was of too radical a nature to be engrafted on the German judicial system; while others considered the merits and defects of the civil jury to be so evenly balanced as to render it inadvisable for adoption, since *Incidis in Scyllam, cupiens vitare Charybdim*. By the code, the power to determine questions both of law and fact is vested in a presiding law-judge, with whom are associated two lay-judges or *schöffen* [*scabini*]."<sup>59</sup>

<sup>57</sup> *Ibid.* Questions involving the infringement of a Prussian copyright were "decided by a jury of 'experts,' long before the general introduction of the jury in that country." Lisber, Civ. Lib. note at p. 234.

<sup>58</sup> *Ibid.* The jurors choose the foreman (*Strafprocess-Ordnung*, § 304), and a two thirds vote is required to convict (*Id.* §§ 262, 307). Court, prosecutor or defendant may submit to the jury the question of mitigating circumstances, the existence whereof shall not be deemed denied, unless seven jurors concur to that effect (*Id.* §§ 297, 307). The court may reverse the verdict, if in its opinion the jurors have erred to the detriment of the accused (*Id.* § 317).

<sup>59</sup> New Jersey presents the anomaly of having a number of lay judges sitting in its highest tribunal—the Court of Errors and Appeals. In each county, moreover, there is a court of common pleas—whose main function is to try criminal offenses of inferior degree—presided over by

In criminal cases, on the other hand, the efficacy of a jury was generally acknowledged," the provision of the Prussian system being essentially re-embodied in the German Code.

For here even the most strenuous supporters of judicial superiority must acknowledge the paramount necessity of having the question of guilt or innocence decided by one's fellows. In the words of De Lolme : " Though an accused person may be exposed to have his fate decided by persons [the petit jury] who possess not, perhaps, all that sagacity which in some delicate cases it is particularly advantageous to meet with in a judge, yet this inconvenience is amply compensated by the extensive means of defense with which the law has provided him. If a jurymen does not possess that expertness which is the result of long practice, yet neither does he bring to judgment that hardness of heart which is, more or less, also the consequence of it." . . . The insti-

a law judge, with whom two lay judges are associated. Inasmuch as the former is the predominating factor, the other two are in popular language rather irreverently but graphically styled " wooden judges."

<sup>60</sup> As far back as 1831, Rudhart wrote: " The jury should not only be considered as an excellent means for familiarizing the people with the laws and elevating public life, . . . but as an essential factor in the constitution of a limited monarchy and an indispensable preservative of the independence and purity of the administration of justice. . . . Public freedom and equity in criminal procedure demand, that the power to convict and the power to punish shall not be united in one person . . . The belief that salaried magistrates are too dependent on the government, affects the reputation of courts and of the administration of justice, which should not only be pure and undefiled, but should be placed above the possibility of a suspicion that it is not so." Cited in Bluntschli's *Staats-Woerterbuch*, art. 'Schwurgericht,' IX. p. 344.

And to the same effect (1856) Mittermaier, *Legislation and Practice with Reference to the Penal Trial*.

<sup>61</sup> Eng. Const. c. XIII.

<sup>62</sup> Hence there is—observes Mr. J. Hampden Doughtery, in a paper on " Legal Dogmatism, Subject of Insanity," published in *The Counsellor*

tution in question was established by human wisdom, and is exercised by human agents, and of course is subject to the frailties incident to man and to all his works."

(N. Y.) Nov., 1893—a growing tendency in criminal cases, where insanity is interposed as a defense, to leave to the jury the decision of the question, whether the accused is of sound or unsound mind, as a plain question of fact, "precisely as the issue which is tendered in every civil case involving mental disorder." cf. *ante*, p. 133.

The old test of sanity—the ability of a person to distinguish right from wrong—is likewise being gradually repudiated in law, as it has long been discountenanced by the best alienists in medicine. The better doctrine is laid down by Judge John F. Dillon, to the effect that it is "not sufficient to hold the prisoner responsible, that he was able to discriminate right from wrong at the time of the commission of the offense, but that in convicting him the jury must find also that he had the power to control his insane impulses." *State v. Feller*, 25 Iowa, 67; cf. N. Y. Penal Code, § 21.

## CHAPTER XI.

### ON THE MEANING OF *JUDICIUM PARIUM*.

It is a popular fallacy, and one shared even by some legal writers and tacitly acquiesced in by others,<sup>1</sup> that trial by jury owes, if not its institution, at least its permanent establishment as a feature in our judicial system, to the following clause in Magna Charta, that great charter of English liberties forced on King John by his barons at Runnymede in 1215 :

*"Nullus liber homo capiatur, vel imprisonetur, aut*

<sup>1</sup> Thus Blackstone (Com. III. c. XXIII.); and Western, in his edition of De Lolme (1841), which was dedicated to, and prepared "with the view of affording useful information to all classes of the subjects of," Her Majesty, permits his author without comment to state that "It was made one of the articles of Magna Charta, that the executive power should not touch the person of the subject but in consequence of a judgment passed on him by his peers; and so great was afterwards the general union in maintaining this law, that the trial by jury . . . hath been preserved to this day." Eng. Const. bk. II. c. XI. § 2.

Even so excellent a scholar as Prof. Pomeroy (Mun. Law, § 490) seems to share this error. "To the general civilization," he writes, "feudalism has doubtless bequeathed, although it did not originate, the idea that the whole people should interfere in pronouncing judgment between litigant parties, that is, the right of being tried by one's peers. . . . The territorial feudal courts, which were held by each suzerain, were attended by the holders of fiefs or *parces*, who took a part in the actual determination of justice between individuals"—leaving it to be inferred that *they* are the lineal predecessors of modern jurymen.

J. I. C. Hare (as late as 1880) contends "that due process of law is equivalent to the judgment of his peers and law of the land of Magna Charta. The *judicium parium suorum* was not, as the majority of the court in *Hurtado v. California*, 110 U. S. 516, 539, 28 L. ed. 232, 236, would seem to have supposed, a right only of the barons, because the guaranty included every freeman, and the yeoman was no less entitled to the verdict of his equals than the peers." Am. Const. Law, 863, 864. But see *Id.* 859.

*utlegatur, aut exuletur, aut aliquo modo destruat* [nec super eum ibimus nec super eum mittemus] nisi per legale iudicium parium suorum vel per legem terræ,"—which, in the popular version, is usually rendered that "No man shall be deprived of life, liberty or property, save by the judgment of his peers and the law of the land."

Hence the purpose of this chapter is to demonstrate—if the delineation of the growth of the jury has not already made clear—the utter baselessness of this theory and to prove that the mode of trial referred to in and sustained by this much abused clause was none other than the judicial determination of questions, in the feudal courts of that time, by the sectatores heretofore<sup>3</sup> considered. Any other view is a mere chimerical delusion—a delusion, however, entertained by Blackstone, and which that high authority did much to nourish and foster when he wrote of trial by jury: "In Magna Charta it is more than once insisted on as the principal bulwark of our liberties; but especially by chapter 29,<sup>4</sup> that no freeman shall be hurt in either his person or property, nisi per legale iudicium parium suorum vel per legem terræ."<sup>5</sup>

<sup>3</sup> "Nor shall we pass upon him, nor send upon him" (*nec super eum ibimus, nec super eum mittemus*) "is interpreted to mean that no man should be condemned, without trial by his peers, either in the court of King's Bench, where the king is supposed always to be present and to render judgment in his own person, or before any judge whom the king may delegate to try him [in his county]." Bowen, Const. of England and America, 11.

<sup>4</sup> Vide chap. VII.

<sup>5</sup> This clause is commonly referred to as chapter 29 of Magna Charta, and printed in a form more or less different from the one given. Our text—as well as that of all other old English statutes quoted in this treatise—is taken from Stubbs' "Select English Charters," in which (p. 142) it appears as chapter 39; this being its place in the text of the charter, as confirmed (1217) by John's son, Henry III.

<sup>6</sup> 3 Bl. Com. c. XXIII.

It is easy, however, aside from the intrinsic defect of this view (which must be manifest to the reader of the preceding pages), to adduce authorities to the contrary. Reeves already seems to have had a correct view of this matter, when, after remarking that the trial by *sectatores* survived the conquest for many years, he states that "these are the persons meant by the terms *pares curiæ*, and *judicium parium*;" the latter being the one employed in Magna Charta. "Successive attempts gradually introduced jurors to the exclusion of the *sectatores*; and a variety of practice, no doubt, prevailed till the Norman law was thoroughly established. It was not till the reign of Henry II. that the trial by jurors became general; and by that time the king's itinerant courts, in which there were no *pares curiæ*, had attracted so many of the country causes, that the *sectatores* were rarely called into action." So, too, Coke in his commentary on Magna Charta draws a clear distinction between the trial by peers and the trial by jury.'

The trial by the *judicium parium* is, then, of far greater antiquity than that by jury; for it was brought over from the continent by the Anglo-Saxons, and flourished for ages afterwards.

<sup>6</sup> Hist. Eng. Law, c. II. p. 85.

<sup>7</sup> 2 Inst. 48, 49.

Sir Francis Palgrave pointedly observes (in his Eng. Com.) that "the patriot who claims the jury as the 'judgment by his peers' secured by Magna Charta can never have suspected how distinctly the trial is resolved into a mere examination of witnesses . . . The ancient jurymen were not empanelled to examine into the credibility of the evidence," but were themselves the witnesses "who, of their own knowledge, and without the aid of other testimony, appended their evidence respecting the facts in question," and predicated their verdict thereon. The modern jury has thus little more than the name in common with its primitive prototype, which was essentially a body of twelve witnesses selected to try a question of fact.

Thus already, in an edict of the Emperor Conrad II. (1024–1039), antedating Magna Charta by almost two hundred years, the principle is broadly laid down, in terms so similar to those in the clause quoted as to make it appear to have been the model for the latter: “*Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum et per iudicium parium suorum.*” While a century later, but many years before the institution of the assise or the enactment of the Great Charter, a law of Henry I. (who ruled from 1100 to 1135) ordained: “*Unusquisque per pares suos iudicandus est, et ejusdam provinciæ; peregrina vero iudicia modis omnibus submovemus.*” And accordingly the institution is to be regarded as part and parcel of the feudal system itself, deriving its efficacy and drawing its support from the custom by which “to do suit (*sectam*) at a county or other inferior court was in fact one of the common tenures by which land was held, and the suitors called *sectatores* or sometimes at a later period *pares*, were therefore bound to give their attendance.”<sup>10</sup>

Consequently a modern legal writer<sup>11</sup> well stigmatizes it as a “popular and remarkable error that the stipulation for the *iudicium parium* in Magna Charta referred to the trial by jury. . . . It was a phrase perfectly understood at the period of Magna Charta, and the

\* Let no one be deprived of (*lit. lose*) any benefit, except according to the custom of our ancestors and by the judgment of his peers.

<sup>9</sup> Leg. Hen. I. 81.

Every one must be judged by his peers, and of the same province, for, indeed, foreign judgments (*i. e.* those reached by foreign methods) we shall discard by all means.

<sup>10</sup> Forsyth, p. 113.

<sup>11</sup> Maccolachlan, Eng. Cvol. III. art. *Jury*.

mode of trial had been in use long before in France and in all parts of Europe where feuds prevailed. It was essentially different from the trial by jury, which could never be accurately called *judicium parium*." We read frequently in the records of those times (and even in Magna Charta itself) of *juratores*, of *veredictum* or *juramentum legalium hominum*, and *jurata vicineta patrie*, all of which expressions refer to a jury; but not a single instance can be found in any charter, in which the jury are called *pares* or their verdict *judicium*."

Hence the term *pares* properly applies to the members of the feudal and county courts—being, of course, employed in a much more comprehensive sense than that of "peers of Parliament"—and these would-be jurymen, when subjected to a critical examination under the legal microscope, "were nothing more than the suitors or homage [*les homes*]" of the baronial and other territorial or local courts, and they discharged the functions of both judge and jury—being, in fact, the whole court presided over by an officer [*le seigneur*] who seems to

<sup>12</sup> For a case illustrative of *judicium parium* in the true sense of the term, see Best, Ev. § 183, p. 183; cf. chap. XII. note.

Nor might a peer waive his right to such trial. When Lord Daerres was indicted for treason in 1585, all the judges met previously to consider any doubts that might arise in the case, and determined that a peer could not waive the trial by his peers. The same was again resolved on the arraignment of Lord Audley, in 1631. "The reason is," says Woodeson (Laws of Eng. II. 581) "that this mode of trial is not so properly a privilege of the nobility, as part of the indispensable law of the land, like the trial of commons by commoners."

Similarly, in olden times, it was held that "knights and men of the highest worth should be upon the jury in any action in which a peer is a party." Year Books, 13 Edw. III. (Pike's ed.) p. 290.

<sup>13</sup> Hence Professor Chase seems to be in error when, in the appendix to his excellent edition of Blackstone (p. 1060), he defines homage as denoting "the *jury* of a court-baron; so called because composed of persons owing homage to the lord." cf. *Id.* pp. 250, 895.

have been closely analagous to the lawman of the Swedish and Norwegian tribunals."<sup>14</sup>

And moreover, as Forsyth<sup>15</sup> well points out, "the rule as to unanimity in the jury is an additional proof that the verdict of the latter was quite distinct from the *judicium parium*. Amongst the *pares* who constituted the judges of the county and baronial courts, the opinion of the majority prevailed : *vincat sententia plurimum* (Leg. Hen. I. 5)."<sup>16</sup>

Hence we are fully justified in drawing the conclusion that trial by the *judicium parium* had no connection whatever with trial by jury, but—to close with a citation from an eminent American jurist<sup>17</sup>—"was the peculiar and well-known feudal process, by which the lord with his vassals [anciently] sat to try questions of title between others of his vassals [*pares*]. It is quite probable, however, that the alternative phrase, '*per legem terræ*' was intended to include trial by jury."<sup>18</sup>

<sup>14</sup> Trial by Jury, p. 302. For the Scandinavian "lawman," see chap. VII. note 20.

<sup>15</sup> *Id.* p. 240, note.

<sup>16</sup> So an old Saxon law enacted : Let doom stand where thanes [*pares*] are of one voice ; if they disagree, let that stand which VIII. of them say ; and let those who are there outvoted pay each of them VI. half-mark. Leg. Ethel. III.

<sup>17</sup> Judge Cooley, Am. Cycl. III. art. *Jury*.

<sup>18</sup> It is held, however, in New York, that a jury trial is *not* guaranteed by the constitutional provision for "due process of law." *Wynehamer v. People*, 13 N. Y. 373.

Chancellor Kent observes : "The better and larger definition of due process of law is, that it means law in its regular course of administration, through courts of justice." Com. II. 13. of *Hurtado v. California*, 110 U. S. 514, 28 L. ed. 232, where the court sustained as "due process of law" a trial and conviction, procured under a state law dispensing with the intervention of a grand jury, and making it the duty of the district attorney to proceed by information against an accused, after examination and commitment by a magistrate.

In *Re Curry*, the phrase was held by a general term of the New York supreme court (1881) to mean "lawful judicial proceedings in a court of competent jurisdiction. . . . Trial by jury is not, in all cases, an essential element in 'due process of law.' It is only in cases in which it had been theretofore used, that the constitution [of 1846] makes it a necessary element in such 'due process.'" 1 N. Y. Civ. Proc. 326; per Davis, P. J., Daniels, J., concurring.

But in some of the New England states, the expression has been held to guarantee the right of trial by jury. *State v. Ray*, 68 N. H. 406; *Jones v. Robbins*, 8 Gray, 320, 343; *Saco v. Wentworth*, 37 Me. 165, 172. And see dissenting opinion of Harlan, J., 110 U. S. 518, 553, 28 L. ed. 232, 244.

Cf. further, as to "due process of law," Burgess, Pol. Sci. I. 188, 197-200, 211, 212.

There is a constitutional right to a trial by jury, in an action for divorce on the ground of adultery. *Batzel v. Batzel*, 10 Jones & S. 561. *Contra, Cassidy v. Sullivan*, 64 Cal. 266.

Whether the right of trial by jury exists in a given case, is determined by the court, not by the parties. *Knickerbocker L. Ins. Co. v. Nelson*, 8 Hun, 21. See *Pennsylvania Coal Co. v. Delaware & H. Canal Co.* 1 Keyes, 72.

If a case embraces both legal and equitable claims, the whole must go to the jury. *People v. Albany & S. R. Co.* 5 Lana. 25; affirmed, 57 N. Y. 161; *Davis v. Morris*, 36 N. Y. 569.

A statute whereby the right to trial by jury is "clogged with onerous conditions" will not be pronounced unconstitutional, unless it wholly prostrates the right or renders it wholly unavailing to the defendant for his protection. *Flint River S. B. Co. v. Foster*, 5 Ga. 194; *Reckner v. Warner*, 22 Ohio St. 275; *Hagood v. Doherty*, 8 Gray, 373.

So colored men are (under our Constitutional Amendments) entitled to trial by a jury indifferently composed of whites and negroes. *Ex parte Virginia*, 100 U. S. 340, 25 L. ed. 677.

For civil rights adjudication generally, cf. *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Strauder v. West Virginia*, 100 U. S. 305, 25 L. ed. 664; and the chapter on "Civil Liberty in the Constitution of the United States," Burgess, II. 184-252.

In *Ex parte Milligan*, 71 U. S. 4 Wall. 141, 18 L. ed. 302, the petitioner was tried by a court-martial in Indiana and convicted of treasonable practices, shortly before the end of the Civil War—the military commander having suspended all civil rights and remedies within the limits of his district, consequent upon the suspension of the writ of habeas corpus (under Const. art. I. § 9) by President and Congress. Held (the Chief Justice and three associates dissenting) that the proceeding was indefensible as a war measure and unconstitutional; that martial rule is confined to the locality of actual war, and could never exist where the courts are open and in the proper and unobstructed exercise of their functions.—Hare (Am. Const. Law, I. 507) says that, if Patrick Henry could have foreseen the opinion of Chief Justice Chase in this case and laid it before

the Virginia Convention, "his disbelief in paper guaranties would have been confirmed, his predictions verified, and the new frame of government rejected without further debate."

In the case of *Claason v. United States*, 113 U. S. 143, 28 L. ed. 957, 114 U. S. 477, 29 L. ed. 179, decided in 1885, it is held that a Mormon's conviction for polygamy by a jury composed—by virtue of an Act of Congress—wholly of monogamists, is not in conflict with the constitutional requirement of trial by one's fellows.

Cf. chap. IX. notes 65-68; chap. X. note 41; also chap. VIII. note 28.

## CHAPTER XII.

### PRESENT ASPECT OF THE JURY.

We have thus traced the history of the jury, as a factor of jurisprudence in general, but more directly in its relation to the English system, have marked the successive ages of growth and strata of accretion and stages of development through which it passed before attaining its ultimate structure, and submit the following conclusions: first, that an institution resembling the modern jury in various respects must have existed in England—brought thither by the Romans, and originating among the Greeks—at the earliest civilized period; secondly, that the Roman institution departed simultaneously with Roman civilization, and this feature of

“The glory that was Greece,  
And the grandeur that was Rome”

has accordingly exerted no influence on the Anglo-Saxons or upon similar institutions subsequently prevailing in the island; thirdly, that no body which can with any degree of propriety be regarded as a jury, existed among the Anglo-Saxons, but that their institutions furnished various elements which afforded a basis of operation for the juridical features introduced by the Norman Conquest; fourthly, that the institutions of the Normans were most instrumental in, and supplied the foundation for, rearing the jury structure; and fifthly, that (in the shape of the assise) it was formally established by positive legislation as an ingredient of our jurisprudence in the reign and by the will of the second Henry, upon the statutes of which monarch

changes were subsequently engrafted by legislation (both parliamentary and judicial) in accordance with historical influences and the progress of jurisprudence.<sup>1</sup>

Does it seem too bold, then, to attribute the establishment of the institution of Henry II. to "the neat and perspicuous Glanville,"<sup>2</sup> or, more euphoniously and precisely, Sir Ranulphus de Glanvilla? "An institution"—writes Emerson, in his essay on Self-Reliance—"is the lengthened shadow of one man." Him, our oldest legal writer, Lord Campbell terms "the father of English jurisprudence;"<sup>3</sup> and the conception of the plan of the assise by him, the chief justiciar and juridical counselor of King Henry, may plausibly be inferred.<sup>4</sup>

It is not strictly within the province of this treatise—whose purpose is to trace the historical genesis of the jury—to discuss and weigh its merits and demerits, and

<sup>1</sup> "Our jury is the outflow of English national influences: for Celt, Saxon, Dane, and Norman have all contributed their elements to form the English nationality, and . . . have added their diverse customs and institutions to be amalgamated into the English municipal law. And through all this mass, the Roman jurisprudence has penetrated, and infused its wonderful vitality and power." *Pom. Mun. Law*, § 27.

And to the same effect Prof. Freeman (*Growth of Eng. Const. c. I.*): "Each change in our law and constitution has been, not the bringing in of anything wholly new, but the development and the improvement of something that was already old. . . . The ancient custom has ever been to shrink from mere change for the sake of change, but fearlessly to change whenever change was really needed."

Concerning "Judicial Legislation," see a paper (by E. R. Thayer) in 5 *Harv. L. Rev.* pp. 172-201, ably discussing its scope and legitimate function in the development of the common law.

<sup>2</sup> Cf. Story, cited *ante*, chap. VIII. p. 87.

<sup>3</sup> *Lives of the Chief Justices*, I. 25.

Stubbs speaks of " . . . significant reforms, which owe their origination perhaps to the great justiciar, Ranulf Glanvill." *Select Charters*, p. 127.

Blackstone refers to him as the inventor of the writ of assise (*Com. bk. III. c. X.*) and the writ of replevin (*Id. c. IX.*)

<sup>4</sup> The name is variously spelled Glanvil, Glanvill or Glanville. He is the oldest writer on English jurisprudence, and was born at Stratford in

to consider its shortcomings. Among the charges brought against it is that it retards (especially in our larger cities) the disposition of suits, which could be more expeditiously tried by a judge sitting alone; and that even after verdict the administration of justice is hampered by appeals predicated upon exceptions taken at the trial to the rulings of the court, in erroneously admitting for or excluding from the consideration of the jury certain evidence, to the alleged prejudice of the appellant.

On the other hand, its champions contend that "one marked benefit of the system, which has done much to distinguish England and American civilization from that of other countries is, that it affords a school for the more intelligent and responsible citizens in the principles and details of the municipal law." The effect

Suffolk, the year of birth being unknown. Glanville was a man of the sword as well as a man of law, and it was he who took William the Lion, King of Scotland, prisoner at Alnwick in 1174. In the next year he was appointed sheriff of Yorkshire, in 1176 a justice of the King's Court and in eyre, and in 1180 chief justiciary of all England. After the death of his patron, Henry II., in 1189, Glanville was removed from office (probably for political reasons) by Richard I. and imprisoned until he had paid a ransom, said by some to have been as much as £15,000. Thereupon he joined the crusaders, and died at the siege of Acre in 1190.

The revision of English laws made in the reign of Henry II. is ascribed to him, and at the instance of that monarch also his famous *Tractatus de legibus et consuetudinibus regni Angliæ* is said to have been written. It is divided into 14 books, and chiefly treats of the forms of procedure in the *curia regis*, with incidental references to the general principles of law. The preface expresses its object to be "not only to instruct the professional lawyer, but such as are less accustomed to technical learning." The first printed edition was published in 1554. cf. Foss, *Judges of England*. Of Glanville's treatise, Prof. Maitland (*Pol. Sci. Quart.* IV. 516, 518), speaks as "the first of our legal classics," and considers its orderly arrangement and practical brevity as doubtless influenced—like the later treatise of Bracton—by the author's knowledge of Roman law. [A still older treatise on English law, called *Quadripartitus*, was published in 1892, by Dr. Liebermann at Halle, to which he ascribes the date 1114.]

upon the people at large, of the instructions from learned judges to the assembled juries from year to year and from generation to generation, cannot be too lightly estimated. No other means, in fact, are provided for communicating to the great body of the people any knowledge of the rules of the civil and criminal law, and of their practical working in controlling the daily business of life."<sup>5</sup>

When Forsyth maintains that the jury is compatible with no other system of jurisprudence than the common law, and that when transplanted elsewhere it is but an artificial growth,<sup>6</sup> he seems momentarily oblivious of the fact that the institution flourished and flourishes in countries so far apart and so differently organized as Scotland and Louisiana, the jurisprudence of both of which is based on the civil law. A more patent explanation would seem to be, that the jury is a product of slow growth, a child of habit and precedent, which cannot arbitrarily be transferred to any land in which heretofore there prevailed some other method of trial, sanctioned by long usage and in accordance with the customs of the realm. It is necessary to prepare the soil before transplanting the flower.

<sup>5</sup> Pom. Mun. Law, § 137.

But another and more systematic means would be a course of free public lectures, such as for several winters have been delivered under the auspices of the Board of Education in New York.

<sup>6</sup> Trial by Jury, c. XVIII. and to the same effect Pomeroy: "It has, of late years, been imported from England into some of the continental states of Europe, and there drags out an unnatural and sickly life," Mun. Law, § 104.

But see, *contra*, Bluntschli's Staats-Woert, p. 367, where we read that "even such writers as are not particularly friendly to jury trial, admit that it has everywhere proved successful in Germany." cf. Cycl. Pol. Sci. II. 660.

Taking a general aspect of the features of jury trial—with particular reference to those countries wherein it has been but newly introduced—it seems that the efficacy and necessity of a petit jury, to try persons charged with criminal offenses, are universally acknowledged.\* On the other hand, the necessity of a grand jury, or body to present these offenders for trial, is generally denied by the jurists of the Continent,† who maintain that there is more dignity, stability, and accuracy to be found in a public prosecutor.‡ This may be so in a monarchy, where that officer is constantly amenable to a permanent executive, itself above the law, and, like Caesar,

“Constant as the northern star,  
: Of whose true fixed and resting quality  
/ There is no fellow in the firmament.”

But in a republic, where these officials are selected (sometimes by popular vote, sometimes by executive appointment) for comparatively short periods, the equitable operation of any such system would be interfered with by the stress of political or personal influence, would concentrate in the public prosecutor too much power and expose him to great temptation in consequence, and would lay open even a worthy official to at-

\* A rather florid eulogy of the institution was that of Sir James Mackintosh (*Misc. Works*, III. p. 245) who, when defending Peltier against the charge of libeling the First Consul, indulged in the following rhapsody: “He now comes before you, perfectly satisfied that an English jury is the most refreshing prospect that the eye of accused innocence ever met in a human tribunal.”

† See, for instance, Bluntschli's *Staats-Woerterbuch*, art. *Schwurgericht*.

‡ In ancient Rome even this functionary was wanting, public trials being predicated on charges preferred by private individuals—of which opportunity for gain or notoriety unscrupulous demagogues, like Clodius, were wont to profit. *Vide* chap. III. note 22.

tacks and intrigues. On the other hand, the proceedings of the grand jury are secret, the responsibility for framing an indictment cannot be brought home to any one man, and there is little or no danger—as there is with a governmental accusing officer—that the machinery of indictment will be prostituted to serve any venal ends of the government. A notable instance of its efficacy was the case of the Earl of Shaftesbury (8 St. Tr. 759–821), whom, in 1681, the grand jury of London refused to indict, notwithstanding the machinations of both crown and bench.

The great point of attack, however, is the civil jury. “In civil cases,” writes a modern jurist, “when the issue must be determined one way or the other on the balance of probabilities, a single judge would probably be a better tribunal than the present combination of judge and jury. . . . He would come to it [a conclusion on the facts and a decision in accordance therewith] more quickly, time would be saved in taking evidence, summing up would no longer be necessary, and the addresses of counsel would inevitably be shortened and concentrated on the real points at issue”<sup>10</sup>—rhetorical gifts and argumentation *ad hominem* no longer availing to obfuscate the triers.

And an American legist writes in a similar strain: “We could now well consider . . . whether the jury is not less a necessity in a perfectly free community of equals than in one composed of three orders; whether its functions, in the progress of our political growth, have not been in great part or entirely performed, so that in the future it is to be simply a preservative and safe-

<sup>10</sup> Prof. Robertson, Enc. Brit. XIII. art. *Jury*.

guard instead of a forming and guiding influence—a conservative rather than a progressive force, and therefore whether we may not limit its application to penal, criminal and political causes, and actions arising in tort or sounding in damages; leaving all matters of account, contract, title, and estates entirely to the court, without the intervention of a jury.”<sup>11</sup>

As against this contention, it is urged that such a change would necessarily add greatly to the labors of the court, tending to cause inaccuracy in and hostile criticism of its decisions of fact, and would expose the judiciary to attempts at bribery or charges of corruption, which (however unfounded) must lower its standing in popular estimation; and that, with the jury, a potent factor in educating the citizens and widening their ideas of law and right would disappear.

It is the judiciary which, in the eloquent language of Mr. Washburn, is “to stand an impartial umpire between the state and its citizens, and the arbiter of private rights. To it the citizen looks for protection when his rights are invaded; and men in all conditions of life yield homage to its judgment. . . . Nor can there be a deeper wound inflicted on a free government than that which a venal and corrupt court can inflict by its unjust judgments.”<sup>12</sup>

And in another place :<sup>13</sup> “The people have no safeguard or protection on which they can so confidently

<sup>11</sup> Yeaman, *Study of Government*, c. XIII. adding: “Such, at least, seems to be the tendency of the professional judgment of the county.”

We are unable to discern any such tendency, unless isolated and sporadic expressions of opinion can be so regarded.

<sup>12</sup> *Study and Pract. of the Law*, p. 297.

<sup>13</sup> *Id.* 177, 178.

rely for life or property, as upon an enlightened and independent judiciary. But when men talk gravely of substituting the learning and experience of the court for the good sense, practical experience and unbiased instincts of an impartial jury, they do violence to history, and injustice to the cause of personal liberty and right. And while I would not let a jury trench a hair's breadth upon the province of the court, I have no hesitation in saying that, for trying and settling disputed questions of fact, through the instrumentality of human testimony, where men and their motives are to be weighed and scrutinized, and balances are to be struck between conflicting witnesses, I had rather trust to the verdict of twelve fair-minded men of average shrewdness and intelligence in a jury-box, than the judgment of any one man trained to the habits of judicial investigation and accustomed to measure his conclusions by the scale and standard of the law. I had rather trust to the honest instincts of a juror, than the learning of a judge. Nor do I believe that . . . there are more instances of mistaken verdicts than of mistaken rulings of law. The most we can expect from either jurors or judge, is an approximation to accuracy in the respective spheres in which they act."<sup>14</sup>

Nor does the judiciary in general favor such a transfer of functions. Thus, in the course of his charge to the jury, in the case of *The People v. Cleary* (Superior Court, New York City, March, 1887) *Mr. Justice Barrett*

<sup>14</sup> Balzac writes in one of his tales (*Mme. Firmiani*): "There is an excitement in a law suit that at times blinds the most honest of men. Lawyers know how to make the absurdest claims seem valid. To the errors of conscience, laws are indulgent syllogisms, and judges have a right to be wrong."

forcibly observed: "There never can be too many safeguards thrown around a citizen. I am the last one in the world to modify those safeguards. I would amplify them to the verge of the possibility of conviction, because I am of the opinion that, no matter how many safeguards of a proper character the law throws around the accused, if we can only get twelve fair-minded, honest, impartial men, no amount of sophistry or of dust thrown into their eyes can change them from arriving at a really just result. They get at the heart and bottom of things far better than we judges do. I hope the judges never will be the judges of facts, but will have a jury to lean upon, and when a jury says that they believe in the innocence or the guilt of a man, I never set up my opinion against them."

And while this was said at a criminal trial, it inferentially reflects the opinion of the bench on the question generally."

Some comment of Mr. Stephen relevant hereto (Hist. Crim. Law, c. XV.) is of interest: "It is hardly

<sup>18</sup> In this connection, an editorial writer to the New York press well observes: "Does anybody think that, because there have been these failures [on the part of juries to render correct verdicts] the administration of justice would be more secure in the hands of selected judges? Consider the bench as it has been constituted in this city. It is not long since judges, sworn to hold the scales of justice with an even hand [referring to the course of *Judge Westbrook*, in holding a session of court in his private office, at an unusual hour, in the alleged interest of *Jay Gould*] gave decisions in the interest of public robbers, and for the distinct purpose of facilitating the schemes of sharpers engaged in plundering corporations." N. Y. Times, June 23, 1883.

Juries, on the other hand, are notoriously disposed (cf. Cyc. Pol. Sci. II. 661) to discriminate against corporations wherever an opportunity occurs, and with them will always give the adverse party the benefit of a doubt. They seem instinctively inclined to adopt the drastic definition—attributed to Coke—that "a corporation is an artificial person, created by act of law, having no body to be kicked and no soul to be damned."

necessary to say that to judges in general the maintenance of trial by jury is of more importance than to any other members of the community. It saves judges from the responsibility of deciding simply on their own opinion upon the guilt or innocence of the prisoner. . . . The institution does place the judge in the position of a guide or adviser to those who are ultimately to decide, and a moderator in the struggle on the result of which they are to give their decision."

An examination of the defects attributable to the system show them to arise from four causes, mainly—three extrinsic and one intrinsic: the three former being the faulty methods followed in the selection and assignment of jurors, the excess to which exemption from jury duty is carried, and the occasional incapacity of the judge to properly regulate the conduct of the trial; the last being the prevalence of the principle of unanimity.

"The method of making up jury lists," says a writer in the *Forum*,<sup>16</sup> "though recently somewhat reformed in several states, is far from satisfactory. The jurors are much below that standard of intelligence which the nature of many of the cases submitted to them seems to require. The practice of summoning talesmen" by special venire is vicious in itself, and a powerful aid to those who practice the art of jury packing. The rules

<sup>16</sup> "Jury Verdicts by Majority Vote," by S. Zetser; *Forum* (May, 1890) p. 809.

<sup>17</sup> A "talesman" is a person summoned to act as juror from among those casually present in or about court, in order to supply a deficiency in the regular panel. The term is derived from Stat. 35 Hen. VIII. c. 6, which provided that if a sufficient number of jurors returned by the sheriff fails to appear, the court may require *tales de circumstantibus* as shall be necessary to serve.

regarding competency for jury service, and especially those disqualifying persons who have formed or expressed an opinion based upon information other than original evidence, are, in these times of rapid dissemination of news, an absurd anachronism, a disgrace to the civilization of the country."<sup>18</sup> In capital cases, it might be

<sup>18</sup> The same writer elsewhere (p. 314) well answers the argument that, by the rule of probability, the concurrent opinion of twelve men is more apt to be correct than that of nine. "True enough. But, if we once enter the field of probabilities, then it must, *a fortiori*, be true that the verdict of nine or ten men is more likely to be correct than that of a minority of three or two; in other words, that it is senseless to allow the opposition of a small minority to override the judgment of a large majority."

He also (p. 319) presents a neat *reductio ad absurdum* of the defense of unanimity in criminal cases on the ground that the failure of any one juror to be convinced by the evidence of the guilt of the accused, constitutes such a reasonable doubt as ought to preclude conviction. "If this sentimental argument were sound, then it should follow as a logical conclusion that the accused should be acquitted whenever one juror believes him not guilty. But no; the absurdity of the unanimity rule is carried so far that even if eleven men vote for acquittal and one holds out for conviction . . . he cannot be acquitted;" but may actually be put in jeopardy again at the option of the public prosecutor. cf. *ante*, chap. X. note 80.

There are no statistics of mistrials, resulting from disagreements, but our authority thinks "the number is enormous;" and that a disagreement in a criminal *cause célèbre*, which has agitated an entire community and has caused its members to hold settled opinions—disqualifying them from service as jurors—might involve the escape of a criminal from all punishment, since another "impartial jury" could perhaps not again be impanelled in the county, and he may not constitutionally be tried elsewhere. [Cf. note 59 for an estimate of mistrials in Massachusetts.] The excess to which exclusion on the ground of bias is carried, may in some measure be remedied by re-enacting elsewhere § 189 of the Oregon Code, which provides that although a person summoned to act as juror "has formed or expressed an opinion upon the merits of the case, from what he may have read or heard, such opinion of itself shall not be sufficient to sustain the challenge [to his competency]; but the court must be satisfied from the circumstances that the juror cannot disregard such opinion and try the issue impartially." cf. N. Y. Ct. Crim. Proc. § 376, subd. 2.

The decision of the trial-judge, overruling a challenge, is reviewable on appeal at the instance of the accused. *People v. Casey*, 96 N. Y. 115.

added, the possession of intelligence seems to be more and more becoming an insuperable disqualification for service as juror, from the standpoint of the defense.

In the same connection Judge R. C. Pitman, of Massachusetts, writes: "In New York the description of the citizen juror is that he should be 'of fair character, of approved integrity, of sound judgment, and well-informed;' and a slight property qualification is also annexed. But everything depends on the administration of the law; if 'the good moral character' is as laxly interpreted as the same phrase practically is in the naturalization proceedings, it affords but little guaranty."<sup>19</sup>

It may be mentioned here that many states provide that the names of jurors shall be taken from the lists of voters, and that, therefore,—where, as in Minnesota and a dozen other states, unnaturalized foreigners are after a brief period of residence permitted to exercise the elective franchise, provided they have previously declared their intention to become citizens,—aliens may often be in a position to decide the right to property, and even to personal liberty, of citizens.<sup>20</sup>

The extreme to which the exemption from jury duty is carried—obviating the service of many persons most desirable by virtue of standing, calling or capacity—may be illustrated by reference to the laws of New York, so far as they affect the city:

To be qualified to serve, a person must be not less than twenty-one nor more than seventy years of age, a

<sup>19</sup> "Juries and Jurymen," 139 No. Am. Rev. 1.

<sup>20</sup> See my paper on "Citizenship and Franchise"—*Columbia Law Times* (1891) vol. IV. nos. 4 & 5—for the frequently misunderstood distinction between these terms.

In *People v. Scott*, 56 Mich. 154, 158, the right of an alien to serve as juror was distinctly affirmed.

male citizen of the United States, and a resident of this city and county ; he is a resident within the meaning of the jury law, if he dwells or lodges here the greater part of the time between the first day of October and the last day of June. He must be the owner, in his own right, of real or personal property of the value of \$250; or the husband of a woman who is the owner, in her own right, of real or personal property of that value. He must also be in the possession of his natural faculties, and not be infirm or decrepit; intelligent; of good character, and able to read and write the English language understandingly."

The following persons are entitled to exemption : A clergyman or minister of any religion officiating as such, and not following any other calling ; a practising physician, surgeon, or surgeon-dentist not following any other calling, and a licensed pharmacist or pharmacist while actually engaged in his profession as a means of livelihood; an attorney or counsellor at law regularly engaged in the practice of law as a means of livelihood; a professor or teacher in a college, academy, or public school, not following any other calling; an editor, editorial writer, or reporter of a daily newspaper regularly employed as such, and not following any other vocation; the holder of an office under the United States, or the state, or city, or county of New York, whose official

<sup>21</sup> Code Civ. Proc. § 1079; cf. *Id.* § 1027. In most of the states, a juror must be the owner of taxable property. In Indiana, New Mexico, North Carolina and Virginia, a real estate qualification exists. In Maryland (*Shane v. Clarke*, 3 Har. & McH. 101) atheists are disqualified. See 12 Am. & Eng. Enc. Law, art. "Jury and Jury Trial," pp. 318-330, where the successive steps, from the selection and organization of a jury to trial, verdict and judgment, and review of the latter, are set forth. Cf. the works of Hirsh, Proffatt, and Thompson and Merriam on Juries; also Ram on Facts as Subjects of Inquiry by a Jury (4th Am. ed. 1890).

duties, at the time, prevent his attendance as a juror; a consul of a foreign nation; a captain, engineer, or other officer actually employed upon a vessel making regular trips; a licensed pilot, actually following that calling; a superintendent, conductor or engineer employed by a railroad company other than a street railroad company, or a telegraph operator employed by a telegraph company who is actually doing duty in an office, or along the railroad or telegraph line of the company by which he is employed; honorably discharged firemen; active and honorably discharged militiamen and active members of the old guard; inspectors and poll clerks; a person who is physically incapable; a duly licensed engineer of steam boilers, actually employed as such; grand, sheriff's, and district court jurors; a person otherwise specially exempted by law."

As regards the third extrinsic defect—the jury being sworn to try all causes according to the law and the evidence, its duty, on the one hand, is to consider the facts testified to and determine their weight, but to take the law from the court; while, on the other hand, it is the right and duty of the court to decide as to

"Code Civ. Proc. § 1061; cf. *Id.* § 1060. By 2 Rev. Stat. 415, § 33, persons actually employed by any iron manufacturing company are also exempted. However, "an exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted." Code Crim. Proc. § 379 [this being the general rule, in all cases, in the several states]. The preceding three sections provide for no less than ten causes of challenge for bias (actual or implied) in criminal cases.

By Code Civ. Proc. § 1064, moreover, a person shall not serve as a trial juror, in courts of record, at more than two terms a year, and is entitled to claim his discharge after twelve days of actual service. Other states have similar provisions. U. S. Rev. Stat. § 12, provides that no person shall be summoned as a juror more than once in two years.

Public officers generally are disqualified from serving as jurors. cf. N. Y. Code Civ. Proc. § 1020.

the admissibility of proposed testimony, and to aid the jurors "by recalling the testimony to their recollection; by collating its details; by suggesting grounds of preference where there is a contradiction; by directing their attention to the most important facts; by eliminating the true points of inquiry; by resolving the testimony, however complicated, into its simplest elements, stripped of every consideration which might otherwise mislead or confuse them. . . . Constituted as jurors are, it is frequently impossible for them to discharge their functions wisely and well without this aid."<sup>33</sup>

Judges—says one of them, in a well-written essay<sup>34</sup>—should direct, not merely preside at, trials; they should assert their authority to check the proneness to delay, want of preparation, and (occasionally) inefficiency of counsel;<sup>35</sup> to exclude irrelevant matter and prevent the

<sup>33</sup> Swayne, *J.*, *Nudd v. Burrows*, 91 U. S. 439, 23 L. ed. 289; cf. Phillips, *O.*, *Scovill v. Glasner*, 79 Mo. 457. *Vide* chap. I. note 18.

<sup>34</sup> "Hints about Trials," by H. B. Brown, 20 Am. Law Rev. 339. This jurist also brings out the fact that England (in 1886) had "but thirty-five superior court judges, including the paid judges of the House of Lords and Privy Council,"—at which time the city of New York, with perhaps one fifteenth the population, had twenty-five judges of courts of record, not counting the superior criminal magistrates,—and that there "the undoubted integrity and ability of the judges are bringing about the practical abandonment of trial by jury in large classes of civil cases;" so that, according to Mr. Maitland, "the fact should be recognized, be it liked or not, that the trial by jury of civil cases is itself on its trial, and the verdict is going against it." The judicial force of our country is declared to be "out of all proportion to the amount of work done, and the cost to the public for jury fees and other court expenses is something enormous."

<sup>35</sup> In an able paper by Austin Abbott, Dean of N. Y. University Law School,—read at the World's Fair Congress, and considering the best means of reducing the present expense, delay and uncertainty of judicial proceedings (reported in N. Y. Evening Post, August 9, 1893)—he remarks in this connection:

"The first great remedy for the delays and uncertainties of the law is to take measures to improve the work of the courts of first instance;

browbeating of witnesses, without waiting for the initiative of the lawyers; and to suppress unfair appeals made to the sympathies or the prejudices of a jury. "A judge who permits himself to read newspapers or write letters during the trial of a cause, is not only guilty of great disrespect to counsel, but is forgetful of his obligation to the state." "The ability to charge a jury clearly, to review the testimony temperately and impartially, and to state the legal propositions in connection with the theories of the respective parties in such manner that they may be readily grasped by the ordinary mind, is justly regarded as the consummation of judicial excellence."

That the correct and successful exercise of these functions requires judicial powers of a high order, is self-evident. Equally evident is it that the best legal talent is not always obtainable therefor—a state of affairs attributable sometimes to the inadequacy of official remuneration, and at others to the fact that popular

and to do this one chief requisite is greater thoroughness in training for the bar. Procedure is merely the means to reach, as quickly as fairness to the party on the defensive allows, the noble contest on the merits. That contest on the merits is the field where all the useful work of the profession is done, and all its laurels are won, and its real pecuniary rewards are earned."

And, as regards the proneness to delay :

"We, of course, do not forget that in litigation one side often wants to delay justice; but courts exist not to aid such a desire, but to defeat it. Courts are created for the benefit of plaintiffs. If there were no plaintiffs there would be no courts. In serving plaintiffs, it is the duty of courts to do full justice to defendants as well as to plaintiffs, but the primary duty is to get to final judgment as soon as may be without injustice. This consideration should be applied with freedom especially to commercial controversies, and all forms of action on contract. . . .

"There is no reason why business men should turn aside from the courts and try the aliphod experiment of amateur arbitration in place of the skilled exactitude of compulsory justice, except that they hope to find a remedy quicker and more sure to end."

elections (especially when frequent) are not, as a whole, conducive to the establishment or development of a pre-eminently able and impartial judiciary. It is the existence of a competent judicial guide and moderator that our jury pre-supposes, as essential for the successful performance of its functions. Hence, where such a discreet mentor is wanting, the defective working of the jury machinery should be attributed to the proper extrinsic cause; for "a case submitted to the unregulated discretion of a jury, without that careful discrimination between matters of fact and matters of law which it is the duty of the court to lay before them, is but little better than a popular trial before a town meeting."<sup>26</sup>

The great intrinsic defect, however, incident to trial by jury, is the prevalence of what Hallam terms "that preposterous relic of barbarism"<sup>27</sup>—the requirement of unanimity,<sup>28</sup> long ago stigmatized as "repugnant to all

<sup>26</sup> *Mr. Justice Miller* on "The System of Trial by Jury," 21 *Am. L. Rev.* 850.

Maine pointedly observes: "A rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication." *Ancient Law*, c. I.

<sup>27</sup> *Middle Ages*, Supp. Notes, 262.

<sup>28</sup> Already sixty years ago, the Commission on the Courts of Common Law—appointed in 1830 as a result of the English law reform movement, led by Bentham, Brougham and others—commented on this feature in its report as follows: "It is difficult to defend the justice or wisdom of the principle [of unanimity]. It seems absurd that the rights of a party, in questions of a doubtful and complicated nature, should depend on his being able to satisfy twelve persons that one particular state of facts is the true one. . . . This necessity must frequently lead to improper compromise (among the jurors) of their respective opinions. . . . The interests of justice seem manifestly to require a change of law upon this subject. We propose that the jury shall not be kept in deliberation

experience of human conduct, passions, and understandings.”” The sole advantage attributable thereto is the opportunity which it gives each individual juror to be heard ; but this end could be equally well attained by enabling a majority (*i. e.* some number greater than half and less than all) to render a valid verdict *after* a definite period of impanelment—thus allowing the minority opportunity to convince the others by argument, but preventing it from nullifying the will of the major part by an absolute veto power, which stands anomalous in a government based on the rule of the majority.”

The objections, on the other hand, to the requirement of unanimity are many, and, as advanced by Bentham (Judicial Evidence) and others, may be said to consist: in the absence of any reasonable security in unanim-

longer than twelve hours, unless at the end of that period they unanimously concur to apply for further time. . . . At the expiration of the twelve hours of such prolonged time . . . if any nine of them concur in giving a verdict, such verdict shall be entered on record, and shall entitle the party in whose favor it is given, to judgment.”

<sup>29</sup> Christian's Blackstone, p. 375, note. See to same effect, Lieber, Civil Liberty & Self Gov. (3rd ed.) c. XX. where the advantages of the institution are well marshalled at pp. 234-337, and it is philosophically observed that “in all spheres the exception is patent; the continuous operation of the rule is latent.”

<sup>30</sup> Pomeroy inclines to trace the origin of this rule to “the early custom of compurgators in a prescribed number agreeing to their oaths, and of recognitors to the number of twelve agreeing in their decision. But see *post*, note 42.

A notable exception to this principle existed—under the English law—where a person criminally indicted was one of the lords temporal: he is also entitled to a ‘trial by his peers’—but so that all the peers of the realm are summoned at least twenty days in advance. When Parliament is in session, the trial is said to be in the High Court of Parliament, the peers officiating simultaneously as judges and jurors. When there is no session, the trial is said to occur in the Court of the High Steward of England, the latter acting as *judge*. In either case, unanimity is not requisite; but a *majority* (which must, however, consist of *at least twelve* persons) may render a valid determination. De Lolme, c. XIII. note.

ity, which is not equally well afforded by a majority; in the diminution of public confidence in the administration of justice, owing to the probability that jurors will disagree and trials thus be abortive; and in involving the application of coercion to force conviction (by the agency of close confinement) on the minds of the jurors—such sham agreements of unconvinced minds engendering, moreover, an element of indifference to veracity in the community at large.”

Indeed, hardly more than a century ago, this element of coercion was (we learn from Blackstone) carried to such an extreme as to require the jurors, after the judge’s charge, to be kept without meat, drink, fire or candle, till they are unanimously agreed. And if they do not agree in their verdict before the judges are about to leave the town they [the latter] may carry them round the circuit from town to town in a cart.”

<sup>81</sup> Forsyth remarks (p. 247): “The truth is, that verdicts are often the result of the surrender or compromise of individual opinions.”

Butler pointedly wrote:

“He that complies against his will  
Is of his own opinion still;  
Which he may adhere to, yet disown,  
For reasons to himself best known.”

(*Hudibras*, pt. III. canto III.)

And Pope sarcastically sings of how—

“The hungry judges soon a sentence sign,  
And wretches hang that jurymen may dine.”

(*Rape of the Lock*, canto III.)

<sup>82</sup> 3 Bl. Com. c. 23, citing 41 Assizes, 11.

At common law, a juror overtaken by illness after the jury had retired to consider the verdict, might receive medical attendance and medicines, “but not sustenance.” *Reg. v. Newton*, 3 Car. & K. 85; *Reg. v. Barrett, Jebb*, C. C. 104.

If taken ill during the trial, he could “be allowed proper refreshment,” and another juror, accompanied by a bailiff, be permitted by the court to attend him; “but if there be no probability that he will be able to return to pursue his duties, a new panel may be ordered, returnable

So old Plowden quaintly reports: "And for that a certain Box of preserved Barberies, and sugar called sugar-candy, and sweet roots called liquorish, were found with John Mucklow, one of the jurors aforesaid . . . therefore the said John Mucklow is committed to the Prison of the Lady the Queen of the Fleet, until he shall have made a fine with the Lady the Queen on that account. . . . which said Fine is affected by the Justices here at 20 shillings."<sup>22</sup>

As late as 1624, a motion was made to set aside the instanter, upon which all the others are competent to serve." 1 Chitty, *Crim. Law*, 269.

These authorities were relied on by Recorder Smyth in his learned opinion (*vide* N. Y. Law Journal, August 12, 1893), filed on denying the motion for a new trial of Dr. Buchanan, recently convicted of wife-poisoning in New York City. The application was based in the main on the temporary separation of one juror from his colleagues, by reason of sudden illness, after the case had been submitted to the jury and before the rendition of a verdict. The recorder held this episode to be at the worst an irregularity, and that irregularities of the jury are not good ground for a new trial, if "not attended with any intentional wrong, and where it is made substantially to appear that the party complaining has not and could not have sustained any injury from them,"—citing *Nichols v. Nichols*, 136 Mass. 256; *Goersen v. Com.* 106 Pa. 477.

The legal periodical just referred to well observes (October 23, 1893): "Much of the present treatment of juries is a survival of the times when witnesses were thumb-screwed into giving desired evidence, and jurors were starved into unanimity."

In New York, the judge presiding at a criminal trial may discharge the jury, after retirement and before agreement, in three cases: (1) Upon the occurrence of some injury or casualty affecting the defendant, the jury, or some one of them, or the court, rendering it inexpedient to keep them longer together; or (2) when, after a lapse of such time as shall seem reasonable to the court, they shall declare themselves unable to agree upon a verdict; or (3) when, with the leave of the court, the public prosecutor and the counsel for the defendant consent to such discharge." (Code Crim. Proc. § 428.) So (*Id.* § 432) "a final adjournment of the court discharges the jury," which is but an incidental adjunct to the tribunal.

<sup>22</sup> *Welcken v. Elkington*, 2 Plowd. 518 a. On the other hand, it was the custom in the time of Elizabeth, that "the party with whom they have given their sentence [verdict] giveth the enquest their dinner." Smith's Eng. Com. c. 18.

verdict of a jury in an action of ejectment, because—in the barbarous jargon of the report—“3 *del Jury ont Sweetmeats* about them.” But inasmuch as this was not attributable to either of the parties, and since the sweetmeats had not been eaten, the court graciously held: “*Ceo ne fait le verdict suspicious, uncore est finale come misdemeanor.*”<sup>24</sup>

It must be conceded that, on the theory of probabilities, the *one* is neither as likely to be right as the many, nor as liable to convince them as to be convinced by them; on the contrary, he is apt to suppose himself mistaken, or fear to be considered obstinate and unreasonable, so that he may, after all, acquiesce. If he does so, his objection only causes delay; if he stands out from the rest, it causes disagreement: in the former case, the enforcement of the principle proved unnecessary and fruitless; in the latter, its maintenance is in direct opposition both to the rule of the majority and to the common experience of mankind, which teaches us that no dozen persons selected at random will take the same view of a fact in controversy—aye, that no dozen individuals will give the same account of an event that took place but an hour ago before their very eyes!

With such a consensus of expert opinion expressed since the early part of the century in favor of the modification of this requirement, it may seem strange that but little progress towards its realization has been made. It requires no *Cedipus* to solve this enigma. We must reckon with the spirit of extreme conservatism, the adherence to hoary precedents whose *raison d'être* has

<sup>24</sup> Les Reports de Sir Gefrey Palmer (ed. 1678) p. 380, who mournfully adds: “*Mes quia le Jury fult depart, et les noemes des offenders nient connus, riens fult fait.*” [But as the jury had left, and the names of the offenders were unknown, nothing was done].

long since departed, which has characterized the law and those charged with its administration and regulation from "time whereof the memory of man runneth not to the contrary" (as the legal phrase goes); characteristics that have caused that great student of human nature, Goethe, to utter his well known lines :

" Es erben sich Gesetz und Rechte  
Wie eine ew'ge Krankheit fort,  
Sie schleppen von Geschlecht sich zu Geschlechtern,  
Und schleichen sacht von Ort zu Ort."<sup>35</sup>

And the same sentiment is thus voiced by Dr. Irving: "English legislators have a very strong propensity to revere whatever has been impressed with the stamp of antiquity. . . . *Nolumus leges Angliæ mutari* is a sentiment first uttered in a barbarous age, and perpetually repeated with unabated approbation."<sup>36</sup>

While Sir Henry Sumner Maine, in his famous treatise on Ancient Law, observes (c. V.): "Much of the old law which has descended to us was preserved merely because it was old. Those who practiced and obeyed it did not pretend to understand it; and in some cases they even ridiculed and despised it. They offered no account of it except that it had come down to them from their ancestors."<sup>37</sup>

<sup>35</sup> In the colloquy between Mephistopheles (who impersonates Faust) and the student—the passage being rendered in Bayard Taylor's translation as follows:

"STUD. —I cannot reconcile myself to jurisprudence.  
MEPHIS.—Nor can I therefore greatly blame you students,  
All rights and laws are still transmitted  
Like an eternal sickness of the race,—  
From generation unto generation fitted,  
And shifted round from place to place."

<sup>36</sup> Intro. to Civil Law (4th ed.) p. 128.

Nor must we forget to reckon with that "foolish consistency," which Emerson (essay on Self-Reliance) stigmatizes as "the hobgoblin of little minds, adored by little statesmen and philosophers and divines."

<sup>37</sup> So Dean Kitchin (Hist. of France, Enc. Brit. IX.) refers to the le-

Aside from the *laissez faire, laissez aller* principle, and the inborn adherence to established precedents and usages, one reason that measurably accounts for the general indifference of the profession to a change in this respect is that the lawyer in active practice takes at different times different views of this question. If he appears for the plaintiff, and has a case of intrinsic merit, well sustained by evidence, he feels reasonably certain of the jury in any event, or may even expect the court to direct a verdict in favor of his client; if, nevertheless, the jury should give an adverse verdict, a motion for a new trial, and (in case this be denied) an appeal, can be predicated thereon—on the ground that the verdict was contrary to the evidence, and therefore contrary to law—whence a double bill of costs is apt to be the final outcome for our lawyer; if the jury should disagree, a second trial and similarly augmented fees are likely to result. If, on the other hand, he appears for the defendant, and has a weak defense, it will serve his end to hold but one juror—with the possible outcome that the plaintiff may become discouraged and refrain from pressing his case to another trial—thanks to the principle of unanimity. It is only when plaintiff has a doubtful case, and the issue is obscured by conflicting testimony, or when defendant has a strong defense or perhaps a counterclaim, that unanimity becomes irksome to the respective attorneys.

gal profession as "that conservative body, which struggled in vain against all invasions of ancient usage, whether from the side of king or people, and which in the end gave many victims and some leaders to the Revolution." Dr. Lieber (Civ. Lib., note at p. 238) remarks that "reforms very rarely proceed from the profession, in any sphere."

*Dick the Butcher* voices the sentiment of Jack Cade's mob, when he interrupts the bombastic harangue of their leader to exclaim: "The first thing we do, let's hang all the lawyers." Henry VI. pt. 2, act IV. § 2.

Influenced by such considerations, then, the active practitioner may one day strongly incline toward the abolition of unanimity, and may the next day (when pleading the cause of another client, possibly in the same court, or perhaps of the same client, in another cause) be equally strongly impressed with its transcendent merit. Sailing between Scylla and Charybdis, suspended midway between Tartarus and Tellus, vacillating between the abstractly right and the concretely expedient, between the real and the ideal, he is drawn hither and thither in accordance with the interests of those whom for the time being he represents, and may aptly address to the jury-reforming enthusiast the words of Faust:

“Du bist Dir nur des einen Triebs bewusst;  
 O, lerne nie den andern kennen!  
 “Zwei Seelen wohnen, ach, in meiner Brust,  
 Die eine will sich von der andern trennen;  
 “Die eine hält in derber Liebeslust  
 Sich an die Welt mit klammernden Organen;  
 “Die andre hebt gewaltsam sich vom Dust  
 Zu den Gefilden hoher Ahnen.”<sup>28</sup>

Were the abolition or modification of this requirement secured, the character of the institution would soon be ameliorated and the two ulcers which mainly disfigure its countenance—bribery and jury-fixing—would speed-

<sup>28</sup> In Taylor's Translation:

“One impulse art thou conscious of, at best;  
 O, never seek to know the other!  
 Two souls, alas! reside within my breast,  
 And each withdraws from, and repels, its brother.  
 One with tenacious organs holds in love  
 And clinging lust the world in its embraces;  
 The other strongly sweeps, this dust above,  
 Into the high ancestral spaces.”

ily disappear." For, first, corruption is needs less practicable, where a majority must be made to succumb to its influence; secondly, hope of profit can no longer act as an inducement for worthless persons to serve as jurors, since the purchase of their votes would be an unpromising investment; thirdly, the occupation of jury-fixer will become a thing of the past, since he will no longer have fit subjects to operate upon, nor parties eager to employ him; fourthly, and consequently, men of capacity, standing, and integrity will with more readiness consent to serve, since their opinion must then carry its proper weight and can no longer be nullified by their intellectual inferiors; fifthly and finally, trials will become shorter, service in the jury box less exacting, and the status of the legal profession itself will be benefited by the change: for the labor of the advocate can no longer be confined to the aim of causing an individual to dissent, but must assume the nobler and broader form of an endeavor to convince the majority of the justice of his cause.

A distinguished justice of the United States Supreme Court advocated the reform on these lines:

"I am of opinion, that the system of trial by jury would be much more valuable, much shorn of many of its evils, and much more entitled to the confidence of the public as well as of the legal and judicial minds of the country, if some number less than the whole should be authorized to render a verdict. I would not myself be willing that a bare majority should be permitted to do

<sup>30</sup> Under the unanimity system, "any one juror, gained and properly armed—armed with the necessary degree of *patience*, suffices." Bentham, *Art of Packing Juries*, c. 5, § 1. Fortified with a good dinner, and endowed with the requisite obstinacy, such a one may well tire out the other eleven and score his point.

this. There could be little difference in the confidence which would be reposed by the court, the public, or the parties, in the opinion of five men or of seven. It should be something more, then, than a bare majority. If the jury is to consist of twelve men, I certainly would not be willing that its verdict should represent less than eight, which is two thirds, or preferably nine, which is three fourths. Many of what are called mistrials, produced by a failure of the jury to render a verdict, would be avoided if the power were given to nine or eight to render a verdict, instead of requiring them all to unite in it, and such a verdict would be entitled to as much confidence as if it were unanimous. In respect to civil actions, where the question at issue is the right to specific property, or to damages for failure to fulfill a contract, or torts against the person or property of the plaintiff, this approach to perfect justice is perhaps as near as the fallibility of human nature permits, and the change removes the most serious objection to the system of trial by jury, the one which stands out as almost without support in reason or experience."<sup>40</sup>

<sup>40</sup> *Mr. Justice Miller*, 21 Am. L. Rev. 859. *T. F. Hargis*, late Chief Justice, in writing of "The Law's Delay" (No. Am. Rev. v. 140, p. 309) likewise favors dispensing with unanimity in civil cases, as "prolific of delay." In *Winsor v. Reg.* 6 Best & S. 170, *Lord Chief Justice Cockburn* pertinently remarks: "Our ancestors insisted on unanimity as the essence of the verdict, but were unscrupulous how that unanimity was obtained. Whether the minority gave way to the majority, or the reverse, appeared to them a matter of indifference. It was a contest between the strong and the weak, the able-bodied and the infirm, as to who best could bear hunger and thirst, and all the discomforts incident to the confinement."

In *Slater v. Mead*, 53 How. Pr. 57, it was held error for a judge to charge a jury: "You must agree upon a verdict. I cannot discharge you until you do," because a verdict thus secured cannot be deemed the unconstrained judgment of the jury upon the evidence, but rather "an

No radical change need be made. In public prosecutions, involving the infliction of criminal penalties, unanimity may perhaps (in capital cases it may certainly) be advantageously preserved; but in civil cases (in accordance with the example set by the constitution of California and followed by a few other states) three fourths of the jury should be sufficient to render a valid verdict.<sup>41</sup>

Were unanimity generally abolished as an essential element in our jury system,<sup>42</sup> the most serious reproach

agreement from a desire to escape longer confinement"—citing with approval the language of Harris, J., in *Green v. Telfair*, 11 How. Pr. 260: "There should be nothing in his [the judge's] intercourse with the jury, having the least appearance of duress or coercion;" also, *Caldwell v. New Jersey S. B. Co.* 47 N. Y. 262.

The case is 'distinguished' in *Cranston v. New York Cent. & H. R. R. Co.* 39 Hun, 811, and 'explained' in *Wiggins v. Downer*, 87 How. Pr. 71.

<sup>41</sup> See the Appendix.

<sup>42</sup> This required unanimity of twelve men would seem to owe its origin not so much to the prevalence of that number in primitive jural tribunals (cf. chapter VIII, note 26) but rather to the force of long habit and custom, which "taught men to regard it as the proper amount of evidence to establish the credibility of a person accused of an offense." (Forsyth, p. 240.) Just as "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act" (U. S. Const. art. III. § 3) and two attesting witnesses are (in New York and most other states of the Union) requisite for the validity of a will, so the requirement of unanimity in the jury—which, as has been seen, partook primarily of the character of a body of witnesses [*ante*, chap. IX. notes 51, 52]—was but the definite embodiment of what the common law finally thought proper to consider conclusive proof of a question at issue.

Brunner (Schw. 112) attributes the required concurrence of twelve to a desire to make up by the number as well as the quality of the jurors for that lack of amenability to counter proof or battle, which characterized other classes of witnesses and modes of trial. cf. *Id.* 364-371.

But "although twelve was the usual, it was not the unvarying number of jurors. . . . In the infancy of the institution the number seems to have fluctuated as convenience or local custom required." (Forsyth, p. 131.) Cases in Fitzherbert's *Abridgment* demonstrate, that anciently a verdict was sometimes taken from eleven, in which case the solitary obstructionist was placed 'in durance vile,' though (as if by way of compensation) both verdicts went on record!

thereto would be removed, its merits would stand out in bolder relief, and ampler recognition once more be accorded an institution which for ages, has served as a potent promoter of the dispensation of justice, and for which—in the opinion of many eminent jurists"—no

Instances are recorded, in the reigns of Henry III. and Edward I., where the jury stood ten or eleven for plaintiff and one for defendant, and judgment was rendered in accord with the verdict of the prevailing side—*"quia praedicti undecim concorditer et praecise dicunt."* Plac. Ann. 56 Hen. III. roll 29.

Indeed, not until the reign of Edward III. was it judicially decided that the verdict of less than twelve is a nullity, the court adding that "the judges of assise ought to carry the jury about with them in a cart until they agreed." 41 Assizes, 11.

4 "The method of jury trial," says Pomeroy, "is certainly that which demands the highest culture among the citizens, in order to realize its ideal benefits. The objections which are urged with the strongest force against the system are all based upon the fact that the people, the twelve representatives of the collective body, who sit as triers in any particular case, have not the qualifications essential to produce the actual good results of this intervention of laymen into judicial disputes. We are bound to the jury trial by all the holiest traditions of our past history; we esteem it as the very bulwark of our liberties; it can only be given up by some great shock and social revolution; but to preserve the institution in its integrity, to make it a conserving and not a destructive element, demands a broad culture, a general diffusion of knowledge, an intimate acquaintance with the outlines of legal science, among those educated classes who should give tone and character to the thoughts and opinions of the whole people." Mun. Law, Intro. § 6.

The objection that the jury is not an *absolute* necessity, and superfluous because it *might* be dispensed with, Dr. Walther meets as follows: "As little as we can claim an absolute necessity for freedom of the press or such other municipal institutions, so little may we speak of the absolute necessity of constitutionalism in general or of the absolute necessity of the jury system. But in connection with the close correspondence of its nature to constitutionalism, its *relative* necessity may be maintained, —and the ground of this necessity subsists in the common *constitutional* principle of the *people's immediate participation in the essential functions of municipal life.*" Bluntschli's Staats-Woerterbuch, IX. 365.

To what absurdly ingenious argumentation some opponents of the jury resort, is illustrated by the assertion of Trummer (in a treatise published at Frankfort in 1856) that "trial by jury is incompatible with Christianity."

substitute more perfect and efficacious has as yet been devised.

The principle of unanimity, however, is not without its defenders even at the present day. Thus Mr. Albert Stickney, an eminent member of the New York bar, while favoring the entire abolition of the jury system—at least in civil cases—nevertheless considers this requirement, as well as its plurality of members, as the only redeeming features of the system, which ought to be preserved as long as the institution exists. As to the latter feature he maintains that “in no cause of any importance should a final judgment be given by only one man,” while the former requirement seems to him to render it certain that “every point seen in a case would be thoroughly considered. . . . Juries are generally made up of men of common sense. They are able to see that, where individual views differ, individual views must yield. . . . A verdict which commands the assent of every one of twelve men will not often be very unjust.”

It is now about ten years since this jurist valiantly entered the arena of discussion and threw down the gauntlet to the champions of the system—first in a clever and caustic article, entitled: “Is the Jury System a Failure?”<sup>4</sup> and subsequently in a letter<sup>5</sup> in reply to various criticisms evoked by his former contribution.

In the former he observes: “However we may theorize on the matter, the distinctive features of our jury system are precisely these: that we take men to sit as judges [of fact] in our courts who have neither train-

<sup>4</sup> *Century Mag.* III. 124.

<sup>5</sup> *Id.* IV. 302.

ing nor experience for their work ; we take new men each day ; and we select them by lot."

After stating that the end to be accomplished by any judicial system is to make justice as sure, speedy and swift as fallible human nature permits, he contends that "the delays and costs of litigation are now its greatest evils. Most men might nearly as well give up their rights as get them only after years of weary waiting. Especially is it the poor and weak who must always suffer most from these delays of the law, which now often amount practically to a denial of justice."<sup>44</sup>

After alluding to the three "distinctive features" aforesaid as so many defects, and referring to the fact that in all cases triable by a court and jury their verdict is a condition precedent to any final judgment for either party to the suit, he points the finger of scorn at "that most singular piece of judicial machinery, the double tribunal . . . made up of one man who knows the law and twelve men who do not ; but where the twelve . . . decide the cause, and the one . . . merely tells them what the law is." And, anent the argument that the jury needs but apply to a given state of facts the principles of law laid down by the judge, "it is this . . . which tries the brains of the strongest men in the legal profession. That is especially the work to which untrained minds are not equal. This attempt to

<sup>44</sup>In Germany, on the other hand, both lawyers and clients are obliged to lose but a minimum of time in dancing attendance at court, inasmuch as the judge can readily determine (from the pleadings and counsel) what number of cases he may conveniently dispose of in a day, there being no unknown factor—such as wrangling over evidence submitted or addresses made to the jury—to be taken into account. Placing 20 cases on the day calendar, and finding perhaps one ready for trial, is an experience there unknown.

have . . . twelve men think with another man's brains, is not fitted to give the best results." "

The next point made is that jurymen leave their ordinary vocations at a sacrifice, and desire to return to them as soon as may be. Intricate causes can, therefore, neither as to facts nor as to the law, have the thorough consideration which they require. Not as to the facts,

"Hence it is that, by force of judicial legislation, 'for fear the jury should decide some question of law . . . complicated with fact, . . . many other questions of fact have at one time or another been taken possession of by the judges'—e. g. the presence of malice aforethought in cases of murder, what is sufficient 'cooling-time' in cases of provocation, and whether (in actions for malicious prosecution) the defendant had 'reasonable and probable cause' for instituting the prosecution complained of." Thayer, 4 Harv. L. Rev. 161.

There is some conflict of authority, however, on the question whether the existence of probable cause or reasonable grounds of suspicion, arising in actions to recover damages for malicious prosecution or false imprisonment, is to be determined by the court. The prevailing rule is that laid down in *Besson v. Southard*, 10 N. Y. 236 (followed in *Burns v. Erben*, 40 N. Y. 463; cf. *Anderson v. How*, 116 N. Y. 336) where it is held: "Whether the circumstances alleged to show probable cause are true and existed, is a matter of fact; but whether, supposing them true, they amount to probable cause, is a question of law." The contrary view (*Cochran v. Toher*, 14 Minn. 386) maintains that the jury should be allowed not only to pass on disputed facts, but to draw any necessary conclusions as to their legal effect. See a note on the subject in *Central Law Journal*, vol. 37, p. 237.

"Another way of securing for the court the application of the law to the facts was that of urging and even compelling special verdicts. . . Sometimes [the judges] ordered them, and enforced their instruction by threats, by punishing the jury, and by giving a new trial. As a matter of history, we know that the jury successfully stood out against this attempt, and that their right was acknowledged." Thayer, *ut supra*, pp. 165, 166, citing *Devizes v. Clark*, 3 Ad. & El. 506; *Chichester's Case* (A. D. 1644), Aleyn, 12; *Reg. v. De Benndley* (A. D. 172), 11 P. Wms. 207; and noting that of recent years in the United States many judges and legislatures have gone back to requiring special verdicts and answers to specific questions, so that at a recent trial (*Atchison, T. & F. S. R. Co. v. Morgan*, 43 Kan. 1) "seventy-eight questions were put to the jury, filling nearly three octavo pages, of fine print and double columns."

because, confronted by a large mass of conflicting testimony, the jurors "must depend upon their own memory of what they have heard, and they come to their decision in one hurried conference of perhaps one or two hours; or if they take long . . . the result at times depends on a mere contest of physical endurance."<sup>48</sup> Nor as to the law, for the judge is, at the same time, "placed under every possible disadvantage. Many difficult points are presented to him for decision at the very end of a trial. He has little time [then] for quiet thought, or for the examination of books. If he makes a slight misstatement" of the law applicable, the party ultimately unsuccessful may predicate thereon a motion for a new trial and—upon the denial thereof—an appeal from the decision."<sup>49</sup> "And it is from a hurried oral

<sup>48</sup> In this writer's forensic experience, "those who think worst of it are jurymen themselves. . . . I have often heard opinions as to the methods of juries given by men who have served in the jury box, and never once a favorable one. Always they have said that they would never wish a cause of their own, if it were a just one, to be tried before a jury." (Century Mag. III. 126.) cf. reference to "quotient verdicts," chap. IX. note 39.]

<sup>49</sup> What seems a very feasible remedy for this evil, is suggested by Mr. Abbott (in the paper quoted *ante*, note 25) so far as judicial errors of commission or omission in directing verdicts are concerned:

"It is now almost universally understood by our courts that in jury cases, before the jury have to decide, there is a question for the judge to decide if asked to do so—namely, whether there is sufficient evidence to go to the jury; or, if the evidence is clear, whether there is sufficient doubt to allow the case to go to the jury. If he thinks there is not enough to go to the jury he should non-suit. If he thinks there is so much that there is not enough doubt to go to the jury, he should direct the verdict. The general test as to the sufficiency of the evidence to go to the jury is, whether it is such that fair-minded men might reasonably differ on the question involved. If so, it is error for the judge to decide it. If not, it is error for him to submit it to the jury. . . .

"Now there seems no good reason why a trial judge, if asked to non-suit or direct a verdict, should not have power to suspend the motion, and take the verdict of the jury subject to his after decision of the mo-

statement that the jury is supposed to gain a sufficient knowledge of the legal principles involved in the cause, to master which the judge has taken the study of years."

Nor does the writer concede that the jury is well fitted to decide even pure questions of fact. This work of judging, sifting testimony and detecting falsehood, requires not mere ordinary "common sense," but minds trained, disciplined and experienced. "A contract is a contract, whether it concerns flour or railway bonds. And for a man to decide justly the rights of the parties . . . it is not necessary that he should be a flour dealer or a bond broker. . . In a few years on the bench, a judge gets a knowledge of the general methods of business men which no business man can possibly have. The thing especially needed in deciding causes is a knowledge of human nature as it shows itself in

tion. Then, should he grant the motion and disregard the verdict, the appellate court, if of opinion that he ought not to have granted it, can, if there be no other error, set aside his decision and order judgment on the verdict without requiring a new trial."

In some jurisdictions, the judge presiding at a trial may direct a verdict subject to the opinion of the appellate court, "where, upon the trial of an issue by a jury, the case presents only questions of law." N. Y. Code Civ. Proc. § 1185.

But such a course is proper only in a case where there is no conflicting evidence as to the material facts, and no exceptions have been taken; or, if taken, have been waived. *Howell v. Adams*, 68 N. Y. 314; *Cowenhoven v. Ball*, 118 N. Y. 231. The effect of such a direction is to suspend the entry of judgment on the verdict until the decision at general term. *Gilbert v. Beach*, 16 N. Y. 606. Similarly (N. Y. Code Civ. Proc. § 1000) the trial judge may order exceptions taken at the trial, to his rulings on points of law, to be heard in the first instance at general term, and suspend the entry of judgment meanwhile.

On the other hand, parties to an action, by requesting the court to direct a verdict, assume and concede that the case involves no question of fact properly submissible to a jury. cf. opinion of Judge McAdam, in *Hall Steam Power Co. v. Campbell Printing Press & Mfg. Co.* 5 Misc. 265, citing *Provost v. McEncroe*, 102 N. Y. 650; *Yale v. Dart*, 26 Abb. N. C. 477, 482 note.

the witness box. And that knowledge can be had only from a long experience in court rooms."

The next, and in our opinion the strongest, point made is that the intervention of a jury "necessitates all the wearisome and needless contests over the admission of evidence," from which the continental jurisprudence is almost entirely exempt. In recognition of the fact that the undisciplined minds of jurymen are not skilled in weighing testimony, in distinguishing the essential from the incidental, in separating the wheat from the chaff, the judge is compelled to exclude from their consideration "all testimony which is not strictly relevant (as the phrase goes) to the points to be decided." . . . Can anything be more absurd? We say in so many words that a jury cannot be trusted rightly to weigh testimony, and yet we keep the jury for the one purpose of weighing testimony.)

With a tribunal thus constituted, particularly in a trial of any length and with adroit counsel employed on either side, it is almost certain that there will be errors committed, to correct which appeals are provided. But "the appellate court gives no judgment on the merits of a cause. It only decides whether there was or was not

<sup>50</sup> Stephen, Dig. Law of Ev. (Chase's ed.), p. 246, says that facts are [logically] relevant to each other when one is the cause of the other, the effect of the other, an effect of the same cause, a cause of the same effect; when one shows that the other must or cannot have occurred, or when a fact forms part of a series of similar occurrences.—Under our present procedure, legal differs from logical relevancy. "All admissible evidence must be relevant; but all relevant evidence is not therefore admissible." Chamberlayne's Best on Ev. § 261, note 1. "Such a fact may still be rejected if, in the opinion of the judge and under the circumstances of a case, it be considered essentially misleading or too remote." Per Strong, J., *United States v. Ross*, 92 U. S. 231, 234, 23 L. ed. 707, 708.

error in one process, in the judge's rulings, either on points of law or on points of evidence," i. e. the propriety of admitting or excluding such. "The *verdict* may have been right or may have been wrong; with that point the appellate court has nothing to do." If the appellate court finds that there has been error in law as aforesaid, "it does not correct the judgment, but only orders another trial, to begin anew the series of blunders and appeals"—at the expense of the litigants and to the profit of their counsel: *Inter duobus litigantibus, tertius gaudet.*

It is this legal treadmill which is accountable for much of the burden of litigation oppressing our courts, and it arises "directly and necessarily from having men to do work which they have never learned how to do."

The conclusion reached by him, therefore, is that this and "its other features, its being made up of men who have no knowledge of the law, and its being a temporary body of men having other callings, make it certain that we shall have many wrong judgments, with long delays and heavy expense to suitors. In short, the jury at this day fails to accomplish the ends which should be accomplished by a well-devised judicial system."<sup>11</sup>

The remedy proposed by Mr. Stickney is to put an appellate court of trained judges at the beginning of the litigation instead of at the end; to have them hear the whole cause on its merits, instead of one or two points on a technicality; to have the court render final

<sup>11</sup> In his rejoinder (Century Mag. IV. 303, 304) Mr. Stickney refers to the United States Court of Claims—which consists of five judges who hear and determine both the law and the facts—and quotes in corroboration a letter from Judge Richardson, to the effect that the scheme works well and that most of the decisions of the court are unanimous.

judgment itself, instead of simply determining whether some other body has blundered ; and (except in special cases) to abolish appeals. Under this scheme provision is to be made for a system of graded courts to try cases of different magnitude or subject-matters, and all decisions are to be unanimous in the first instance ; otherwise the case must be retried.

To meet the contention that such a change would be undemocratic, it is urged that "the only change here suggested is to put men of experience in the place of men without experience. . . . True democracy consists in having the people control the machinery of government, not in having them make a vain attempt to operate it with their own hands."

Similarly iconoclastic is an editorial in the *Nation*,<sup>52</sup> published almost contemporaneously with the foregoing, pointing out that the jury has already been displaced in a large number of cases and claiming that its continued maintenance in others is based on "the delusion that it has, in any system of law, a sacred position as a method of deciding all questions of fact. . . . When the chancellors began to introduce 'equity' into England, they struck the first serious blow at jury trial, and they were stoutly fought by the old common lawyers. But nowadays law and equity constitute one system ;"<sup>53</sup> and according as a question takes one form or

<sup>52</sup> Vol. 37 (1883) pp. 90, 91: "Delusions as to Jury Trial."

<sup>53</sup> In Bispham's *Equity* (ed. of 1887) note to § 15, we find enumerated: (1) States wherein distinct courts of chancery exist—Alabama, Delaware, Kentucky, Maryland, Mississippi, New Jersey, and Tennessee; (2) States wherein chancery powers are exercised by judges of common law courts, but according to the course and practice of chancery—Arkansas, Connecticut, Florida, Georgia, Illinois, Iowa, Maine, Massachusetts, Michigan, New Hampshire, North Carolina, Oregon, Pennsyl-

another form, it will be tried with or without a jury. The question of damages for breach of contract goes to a jury; the question of ordering the [specific] performance of a contract goes to a judge. A trespass to land goes to a jury; an injunction against a trespass comes from a judge. The sanity of the maker of a will is decided by a surrogate; the same will may be brought before a jury, if the question arises over the title to land. . . . We have now, side by side with jury trial, another form—that of trial by a judge—which in a vast amount of litigation takes the place of jury trial without objection from anybody.”

The real reason why it is preserved at all here, “and why it has been introduced into Europe while it is falling into decadence with us, is the necessity of having a popular tribunal for the trial of criminal cases,” and as to these the main complaint now made “is that juries do not convict; that it is a piece of machinery which only aids offenders to escape the clutches of the law.” For this complaint, the abolition of unanimity would seem an adequate, though heroic, remedy.

The writer’s conclusion is that jury trial is “not in itself a good method of determining facts at all; that, far from being a common right in civil cases, it is unobtainable in numerous classes of them; that in ordinary cases between man and man it is no longer regarded, even by the legislature,” as a precious institution; that

vania, Rhode Island, Vermont, Virginia, West Virginia, and Texas [which, it may be noted, has a distinct court of criminal appeals]; (3) States in which the distinction between actions at law and suits in equity is abolished, but where certain equitable remedies are still administered under the statutory form of the civil action. This group includes the remaining—nineteen—states of the Union.

“The legislation of every state continually tends to reduce the field

its chief value consists in its furnishing a popular tribunal in proceedings to which the Government is a party."

The weighty voice of Sir James Stephen (in the ninth chapter of the History of the Criminal Law) is raised in the same strain. He thinks that the abolition of unanimity must needs "diminish the security provided by trial by jury in direct proportion to the occasion which exists for requiring it. If a case is easy, you accept a small majority. If very difficult, a still smaller one." He considers the unanimity required of the jury as "essential to it. If that is to be given up, the institution itself should be abolished."

covered by jury trial, first by permitting resort to a judge or referee, and finally (as the law stands in Massachusetts to-day) by abolishing it altogether in civil cases unless it is insisted on by one party or the other." (Nation, XXXVII. 91.) In the district courts of the city of New York, the justices decide all cases within the jurisdictional limit (\$250) without a jury. If such be desired, it "must be demanded at the time of joining an issue of fact, and is waived if neither party then demand it." It consists of six persons only, unless both parties agree to a trial by twelve. N. Y. City Consolidation Act, §§ 1372, 1373.

An appeal from the judgment may be taken to the general term of the court of common pleas, which shall decide "according to the justice of the case, without regard to technical errors or defects, which do not affect the merits. It may affirm or reverse the judgment of the justice, in whole or in part, and as to any or all of the parties, and for errors of law or of fact." Code Civ. Proc. § 808.

On the other hand, the jury has been suffered to trespass and encroach upon the legitimate functions of the courts in Arkansas and several other states by constitutional provisions that judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall simply declare the law. *Vide Appendix*

So the growth of democratic ideas is said to foster a "tendency to make the juries in criminal cases the judges of the law as well as of the facts." II. Cycl. Pol. Sci. 660, instancing Georgia, Louisiana, Maryland, and (optionally) Minnesota; while in Indiana the jury in a capital case does not only determine the guilt of the prisoner, but likewise decides whether he shall be punished by death.

The constitutions of a number of the states (including New York, art. 1. § 8) prescribe that in criminal prosecutions for libel "the jury shall have the right to determine the law and the fact." cf. *ante*, p. 127 note.

In the latter connection, however, the same authority (chapter XV.) maintains that "the securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for trial by a judge and jury." For in the first place, the judge is one known and responsible individual, the jurors are twelve unknown quantities—"a group just large enough to destroy even the appearance of individual responsibility." Secondly, jurors give no reasons for their decision, but judges generally do so, and ought to be made to do so formally in all cases—this being in itself "a security of the highest value for the justice of a decision," since "an unskilled person may no doubt give bad reasons for a sound conclusion, but it is nearly impossible for the most highly skilled person to give good reasons for a bad conclusion." Thirdly, the remedy of an appeal from a judgment based on the verdict of a jury would (ordinarily) result only in a new trial; that from the decision of a judge (usually) in a final judgment. Fourthly, while the verdicts of juries—like the decisions of judges—are just in the large majority of cases, long experience both on the bench and at the bar causes our authority to conclude, that the exceptions with juries "are more numerous than in the case of trials by judges without juries." Finally, judges ought to be and usually are men of greater intelligence, better education and more force of mind, than jurors. While a dozen persons, with different habits of mind, have the advantage of being able to approach a case from many different points of view, "this advantage is obtained only when all the jurors listen to the whole of the evidence; and it continually

happens that several of them are half asleep, or listen mechanically, or think about something else, and when the verdict is considered they follow the lead of" the most masterful mind among them. Mr. Stephen concludes: "I think that as far as skill and intelligence go, it would be impossible to have a stronger tribunal than a jury of educated gentlemen presided over by a competent judge. I cannot, however, say much for the intelligence of small shopkeepers and petty farmers, and whatever the fashion of the times may say to the contrary, I think that the great bulk of the working classes are altogether unfit to discharge judicial duties, nor do I believe that, rare exceptions excepted, a man who has to work hard all day long at a mechanical trade will ever have either the memory, or the mental power, or the habits of thought, necessary to retain, analyze, and arrange in his mind the evidence of, say, twenty witnesses to a number of minute facts given perhaps on two different days." Hence, as has been observed above, all verdicts are approximations to accuracy only."

**NOTE ON THE THEORY OF PROBABILITIES APPLIED TO THE CORRECTNESS OF VERDICTS.**

Let  $p$  represent the probability that each juror, individually, would render a correct verdict,  $n$  the whole number of jurors, and  $m$  a given minority thereof. Then the probability that a unanimous verdict will be right, is

$$\frac{p^n}{p^n + (1-p)^n} = \frac{1}{1 + \left(\frac{1-p}{p}\right)^n}$$

and the probability that a verdict rendered by  $n-m$  jurors will be right, is

$$\frac{p^{n-2m}}{p^{n-2m} + (1-p)^{n-2m}} = \frac{1}{1 + \left(\frac{1-p}{p}\right)^{n-2m}}$$

Now, if  $p = \frac{3}{4}$ , i. e. suppose an individual juror to be right three times out of four on the average, we find (on substituting the proper numerical equivalents in the first formula) the probability that a unanimous verdict is correct, to be as 531,441:1. Similarly (substituting in the

last formula) the probability of the correctness of a verdict concurred in by 9 jurors out of the twelve, is as 729:1; that of one by 8 jurors, as 81:1; and that of a bare majority, as 9:1 only.

On the hypothesis that an individual juror may be right but eight out of twelve times,  $p = \frac{2}{3}$ , and then the probability that a unanimous verdict is correct, is represented by the reduced ratio of 4096:1; one rendered by nine jurors, 64:1; by eight jurors, 16:1; and by a bare majority, 4:1 only.

Again, if  $p = \frac{1}{2}$ , i. e. supposing the extreme case that an individual juror is as frequently wrong as right, the formulas both reduce to  $\frac{1}{2}$  [from which fact Forsyth—who (c. XI and app. II) employs similar formulas, but thence derives excessively large ratios in some way that leaves full play to conjectural ingenuity,—infers that “if it is only an even chance that each juror is right, it is only an even chance that a decision of any majority is right,” and “that if there are twelve persons who are each as likely to be right as wrong, and eleven of them agree in the same opinion against one dissentient, the probability remains still as great that they are wrong as that they are right.”]

Another inference properly deducible therefrom, mathematically, is that (on the last hypothesis), of all the verdicts that actually occur, one half will be right and one half wrong. For instance, if the jury consisted of two persons, John Doe and Richard Roe, all the possible votes would be: (1) Doe right, Roe wrong; (2) Doe wrong, Roe right; (3) Doe and Roe right; (4) Doe and Roe wrong—and of the last two votes, one would be right and the other wrong. Similarly in a jury of three there would be 8 votes; in a jury of four, 16 votes; in a jury of five, 32 votes; in a jury of six, 64 votes; in a jury of  $n$ ,  $2^n$  votes; but in all cases only two of the votes could be unanimous, and of these, again, one would be right and the other wrong.

Logically and practically, however, the question is not one of chance. In the formulas, the elements of personal intercourse and of judicial guidance are necessarily eliminated. But jurors do not give their votes uninstructed by the court and uninfluenced by interchange of views among themselves. When discussion begins, chance virtually ceases, personal influence exerts its force, and the evidence heard and the witnesses seen become factors in the ultimate decision.

That law has its amenities as well as literature—which latter the elder Disraeli so entertainingly portrayed—is shown by the very special and (nominally) most distinguished jury, which the facetious High Sheriff of Huntington had returned in 1619, after Judge Doderidge had rebuked him for not procuring jurors of sufficient respectability. At the opening of the next term, the following list was read out in court with great gusto and emphasis: Max King of Torland, Henry Prince of Godmanchester, George Duke of Somersham, William Marquis of Stukely, Edward Earl of Hertford, Richard Lord of Worseley, Richard Baron of

William L. Scott, of the St. Louis bar, in a well considered paper<sup>22</sup> deserving close analysis, lays stress on the

Bythorpe, Edmond Knight of St. Neots, Peter Esquire of Easton, George Gentleman of Spaldock, Robert Yeoman of Barham, Stephen Pope of Weston, Humphrey Cardinal of Kimbolton, William Bishop of Bugden, John Abbot of Stukeley, Richard Friar of Ellington, Henry Monk of Stukeley, Edward Priest of Graffham, and Richard Deacon of Chatsworth.

Antipodal hereto was a Puritan jury return at Rye (mentioned in Brome's "Travels over England") consisting of these worthies: Accepted Trevor of Norsham, Redeemed Compton of Battel, Faint-not Hewet of Heathfield, Make Peace Heaton of Hare, God Reward Smart of Tiseshurst, Stand-fast-on-High Stringer of Crowhurst, Earth Adams of Warbleton, Called Lower of Warbleton, Kill-Sin Pimple of Witham, Return Spelman of Watling, Be Faithful Joiner of Britling, Fly Debate Roberts of Britling, Fight-the-good-Fight-of-Faith White of Emer, More-Fruit Fowler of East Hodley, Hope for Bending of Hodley, Graceful Harding of Lewes, Weep-Not Billing of Lewes, and Meek Brewer of Okeham.

Mention may be made in this connection of the jurors at the trial of Faithful (Pilgrim's Progress, pt. I):

"Then went the jury out, whose names were Mr. Blindman, Mr. No-good, Mr. Malice, Mr. Love-lust, Mr. Live-loose, Mr. Heady, Mr. High-mind, Mr. Enmity, Mr. Liar, Mr. Cruelty, Mr. Hate-light and Mr. Implacable, who every one gave in his private verdict against him among themselves, and afterwards unanimously concluded to bring him in guilty before the judge. And first among themselves, Mr. Blindman, the foreman, said, 'I see clearly that this man is an heretic.' Then said Mr. No-good, 'Away with such a fellow from the earth.' 'Ay,' said Mr. Malice, 'for I hate the very looks of him.' Then said Mr. Love-lust, 'I could never endure him.' 'Nor I,' said Mr. Live-loose, 'for he would always be condemning my way.' 'Hang him, hang him,' said Mr. Heady. 'A sorry scrub,' said Mr. High-mind. 'My heart riseth against him,' said Mr. Enmity. 'He is a rogue,' said Mr. Liar. 'Hanging is too good for him,' said Mr. Cruelty. 'Let's despatch him out of the way,' said Mr. Hate-light. Then said Mr. Implacable, 'Might I have all the world given me, I could not be reconciled to him; therefore let us forthwith bring him in guilty of death.'"

Verily, then, there "have been grand jurymen since before Noah was a sailor." *Twelfth Night*, act III. scene 2.

<sup>22</sup>"Should Trial by Jury in Civil Cases be Abolished?" 20 Am. L. Rev. pp. 661-679.

fact that the intervention of a jury in civil trials is not the prevailing but the exceptional method among the enlightened nations of the world. These, with the exception of Great Britain, its dependencies, and the United States, have found no need therefor, although as highly civilized and with as complex a political and social organization as our own. Yet, in every one of the United States "it is protected from distinctive legislation by constitutional provision." "

"Among its advocates no uniformity of views obtains. With some the requirement of unanimity in the verdict is its most objectionable feature; with others it is its chief excellence. With some it is only a safe method for the determination of questions of fact when the jury are under the guidance of the presiding judge in 'summing up' the evidence; with others it is only to be trusted when the judge is prohibited from making any comments whatever upon the evidence. With some the fact that the jury is made up indiscriminately from the mass of the community . . . furnishes the best guarantee for the correct determination of the issue submitted to them; with others this is an element of weakness and insecurity, furnishing a better opportunity for appeal to their passions and prejudices, and for the introduction of extraneous matter in argument. With some, it is valuable as serving to bring the people into closer relationship with the courts, . . . with others, in the fact that [a] body of men, uneducated and inexperienced in the investigation of facts and in the application of legal principles to facts, is injected into the judicial system, is to be found the true cause of the dis-

" Cf. the Appendix to this work.

satisfaction, which to no inconsiderable extent prevails respecting the administration of justice in the courts."

The writer continues that the need of reformation is generally admitted in the mode of selection and respecting the qualifications of jurors, as well as in the matter of peremptory challenges and challenges for cause, whose excessive indulgence "operates to exclude from the jury-box the most intelligent on the list, the men who read the newspapers and keep posted on the current events of the day;" and contends that "if after several centuries of trial there is no common ground upon which its advocates stand . . . it may well cause us misgivings as to the intrinsic merits of the institution itself."

Commenting on the collateral benefit attributed to it—that it familiarizes jurors with legal principles and causes them to acquire a clearer conception of their civic rights—our writer forcibly remarks: "It should be remembered that courts of justice are not organized for the purpose of being educational institutions; but for the trial of causes. They are not organized for the enlightenment of the citizen, but for the determination of his rights . . . Whatever method [of trial] best accomplishes this end, should prevail."

The conclusion of Mr. Scott is that the only reformation practicable is to make *tabula rasa* with the institution itself, at least as a medium of decision in civil causes; for "its claim for retention in the criminal branch of our jurisprudence," as a protector of our liberties, is "not to be undervalued." The ratiocination leading up to this conclusion substantially corresponds to that of Mr. Stickney. It is decried as an

anomaly that a judge qualified by education and experience to weigh and discriminate testimony, presumed fitted to eliminate all extraneous matter and "to direct the inquiry amidst the tangled web of conflicting statements to the true points of solution," as well as to perform the difficult task of properly applying the law to the facts of the case, "capable, forsooth, of acting as guide to the jury through all the intricacies and obstacles that attend their journey to a verdict," should be considered "competent to point out to them how to reach the goal, but incompetent to go there himself!"—a sort of legal Moses, privileged to behold from afar, but not to set foot in, the promised land.

The writer forcibly points to the many heads of jurisdiction, wherein the chancellor—or, under the American code system, the judge in equity cases—has for ages been vested with the decision of questions of fact: such as trusts, their creation, execution and violation; fraud, accident and mistake; what notice is sufficient to put upon inquiry a party in cases of constructive trusts and frauds; questions of identity, legitimacy, insanity, undue influence; testamentary dispositions; the specific performance of contracts, and the marshalling and distributing of assets; the granting of injunctions, and damages incidental thereto.

The discretion of an equity judge to submit certain issues to a jury is rarely invoked, for so great is the confidence of solicitors and suitors in the ability and impartiality of the judge, that even when difficult and complicated questions of fact are to be decided, they rarely request the intervention of a jury.

Attention is drawn to the incongruity existing under

the system generally prevailing in the United States,— which dispenses with separate courts of chancery and transfers their functions to a common law judge, holding special or equity term, — that “to determine the simple question as to whether or not a promissory note has been paid, twelve men must be called into the jury box, because the case happens to be one on the law side of the court; while the most complicated questions of fact arising out of alleged fraud, or breaches of trust, or constructive notice, are decided by the judge [without a jury] because the case happens to be on the equity side.” Such a system is wholly artificial.

[In answer to those apologists for the jury, who concede that the judge is equally well fitted to measure damages where a contract affords a fixed rule therefor, or where they are proximate or estimable by computation only, but claim that in all cases of tort (involving the award of discretionary damages, punitive or vindictive) the jurors, fresh from contact with every day life, are best qualified to gauge them, our authority observes that just in this class of cases there is greater scope and stronger temptation for the manifestation of prejudice, as well as for the exercise of unwarranted sympathies, than in any other. Nor are our judges “taken from cloistered retreats and elevated to the bench. They are, as a rule, called from active practice, and from a large and varied experience with the daily affairs of life, to preside in the courts,” and are with rare exceptions “men of practical sense and experience . . . controlled by a higher sense of responsibility than impresses twelve men called in for the time being from the busy scenes of life to pass upon the issues in a

particular case, and then to disappear from view again and resume their various avocations." A judge knows that his position and reputation depend on the integrity, "coupled with ability to comprehend and apply the law, which he exhibits in his judicial career. The very character of his office thus begets an exalted sense of responsibility, and a sensitive appreciation of the obligation resting upon him to deal out even-handed justice to litigants, without fear or favor."

In conclusion, it is contended that from the substitution of a judge as trier of the facts in controversy, these advantages would result: (1) Cases would be disposed of more expeditiously—the impaneling of the jury alone, and the *ad captandum* arguments addressed to it by counsel, consuming in the aggregate many days at each term of court. (2) New trials and mistrials would be obsolescent, and the delay incident to retrials—one great cause of complaint with the public"—be largely

<sup>58</sup> Mr. Robert Y. Hayne ("Shall the Jury System be Abolished?" No. Am. Rev. vol. 139, pp. 343-355) pointedly observes: "In this way a cobbler may be called upon to decide a question of commercial usage; a blacksmith, a question as to the proper degree of skill in repairing a watch; a saloon keeper, a question as to the value of slandered character; an old-clothes man, a question as to the proper degree of skill in running a railway; and so on *ad infinitum*."

Again, "there can be no advantage in mere numbers, for the 'average intelligence' of a jury cannot rise higher than the intelligence of the best of them, which is usually much below that of the judge."

"It is true that the institution is of great antiquity, and that this raises a presumption in its favor, but, like many another thing, it has long survived its usefulness."

<sup>59</sup> Judge Pitman ("Juries and Jurymen," No. Am. Rev. v. 139, pp. 6, 7) says that in Massachusetts an average of five per cent of the whole number of cases tried results in disagreements, and that "it is also well to remember that the cases in which juries disagree are apt to be those of most importance and of the longest duration."

He suggests (p. 11) that the contingency of exceptional cases, wherein

obviated. (3) The expense of litigation would decrease—the sums thus saved amply sufficing to provide for

"a majority may be carried away by popular prejudice or personal sympathy," may be met by a proviso that the concurrence of the presiding judge shall be requisite to validate a majority verdict.

Most of the states seek to meet such emergencies by providing for a special or "struck" jury in such cases. Thus in New York (Code Civ. Proc. §§ 1063-1069) it shall be ordered whenever it appears to the court that a fair and impartial trial cannot otherwise be had, or that the importance or intricacy of the case requires such a jury. Thereupon the clerk of the court (or in the counties of New York and Kings, the commissioner of jurors) upon eight days notice previously given, selects from the whole jury list "the names of forty-eight persons, whom he deems most indifferent between the parties and best qualified to try the issue;" and from this special list the attorneys for each party alternately strike out one name, until there are left twenty-four, from which the jury of twelve is selected and impaneled in the usual manner. The expense of striking such a jury must be borne by the party applying for it, and is not taxable in the costs of the action.

The same state also continues (by Code Civ. Proc. §§ 1070, 1071) what is known as a "foreign jury," which is a jury drawn from, and by the sheriff of, a county other than that in which the place of trial is situate, upon order of the court after application of a party who believes that an impartial jury cannot be had in the county where the suit is pending.

Under the New York statutes, it has been held that foreign and struck juries will be granted in extreme cases only. Such is the practice also in Indiana, Louisiana and New Jersey. On the other hand, by the statutes of Alabama, Arkansas, Delaware, Iowa, Wisconsin and Ohio, a special jury must be granted on the request of either party. See note to *Spencer v. Sampson*, 1 Cal. Cas. (Law ed.) 498, and cases cited.

As to special juries at common law, see 3 Bl. Com. c. XXIII. They were of great antiquity. Thayer (5 Harv. L. Rev. 300) makes mention of two "London juries of cooks and fishmongers, where one was accused of selling bad food," in 1357 and 1394, and of "a jury of merchants . . . to try an issue between two merchants," in 1645. Later they fell into desuetude, so that in 1730 it was found necessary to pass a declaratory act—Stat. 3 Geo. II. c. 25, § 15—providing that either party in any case, civil or criminal, may on motion have a special jury at his own expense. Lord Mansfield is said (4 *Ibid.* 173, citing *Pickering v. Barkley*, Styles, 132) to have been mainly instrumental in building up the commercial law through the medium of special juries, by taking their opinions as to mercantile usage and, when they appeared reasonable, founding rules of presumption thereon. Many questions were thereby removed from the control of the jury; for "in such cases, the judges instructed the

the increased number of judges necessitated by the change. (4) Lawyers would lose the incentive for mere argumentation *ad hominem*, as well as the occasion "for indulgence in intemperate and unprofessional discussion of the testimony" and "for improper methods in conducting the trial itself, so as to influence the minds of the jurors." Finally, the point is made that law and equity—whose tribunal of decision, forms of pleading, and rules of evidence are already, under the code system, substantially the same—will be definitely blended into a harmonious whole, and the administration of the law become homogeneous, when by the extirpation of the jury all distinction in methods of trial between cases legal and equitable will have been abolished.

One immediate effect of any organized movement for the abolition of the jury may be animadverted on *en passant*. Stillborn in other respects, it would at least serve to fire the hearts of those who now shirk the obligation of jury duty wherever feasible.<sup>60</sup> The butcher, the baker,

jury that they 'ought' to find what was thus presumed; and, what was more, they enforced the duty upon *nisi prius* judges and upon juries by granting new trials if it was disregarded." *Ibid.* 166, 167, cit. *Jenkins v. Harvey*, 1 Crompt. M. & R. 877. Cf. the interesting chapter on Presumptive Evidence, Presumptions, and Fictions of Law in Chamberlayne's *Best on Ev.* §§ 296-430; and, as regards the criminal law, *Ibid.* §§ 431-471.

In the category of special juries falls the jury *de medietate linguae*, that is, a jury one half of whose members were aliens (provided so many could be found at the place of trial) which, after application to the court for that purpose, the sheriff was formerly obliged to return in all cases where an alien was a party. By stat. 6 Geo. IV. c. 50, §§ 3, 47, it was limited to trials for felony or misdemeanor only; and by 33 Vict. c. 14, § 5, it was abolished. It still survives in Kentucky. *Gen. Laws* 1879, p. 571.

<sup>60</sup> And the same class fails in its duty to the state generally. In New York city, for instance, the names of all jurors are taken from the registration lists, and many fail to register—and thus lose their vote—simply to evade jury duty. We are acquainted with an estimable gentleman, a member of the City Reform Club, who waxes wroth when govern-

the candlestick-maker would suddenly emerge from the seclusion of their shops, filled with indignation at the bold attempt to deprive them of an alleged inalienable heritage of English and American freemen,—as it will be characterized by political agitators and time-serving demagogues—until, in the verse of Thackeray,

"Even the tailors began to brag,  
And carried an embroidered flag,  
*Aut vincere, aut mori.*"

The question of abolishing the jury can hardly be called a living one, and its discussion at the present day is purely academical. Until a reformation of the system of trial by jury—on the several lines herein above referred to—shall have been made, until it will have been in operation as reformed for a considerable period, and not until its continued inefficacy will then be demonstrated, any movement looking to its abolition will fall flat, and must be deemed premature.<sup>61</sup> The dual

mental abuses are exposed, contributes liberally to movements for their rectification, but never votes for the reason given. That this is not an isolated case—but one of a considerable class, habitually abstaining from the exercise of the elective franchise—is shown by the following data: at the municipal election in New York city in 1890, out of 245,000 persons registered, but 215,000 voted for mayor—a loss of twelve per cent. At the preceding presidential election (1888), there were registered some 286,000 persons, of whom but 269,000 voted for president—a difference of six per cent. At the election of 1892, 310,000 citizens registered and 285,000 voted for president—a difference of eight per cent. The number of persons, in the city, *entitled to register and vote*, is estimated at from 325,000 to 350,000. At least forty thousand citizens of New York, therefore, or more than twelve per cent of the whole number of legal voters, never exercise the elective franchise.

<sup>61</sup> But this cannot be said of the proposition to lop off excrescences of the system, like the Coroner's Jury, which has long outlived its usefulness. This cumbersome contrivance serves no function that an official medical examiner, detailed to investigate the facts of a particular case and to lay the result before the district attorney or before a committing magistrate, could not perform with greater promptitude and efficacy. [See memorial of Grand Jury in N. Y. City, published in the local press,

association of a jurist who lays down the law" and of laymen who determine the facts" is too closely inter-

Sept. 29-30, 1898.] The survival of this legal fossil is (aside from its being political provender) solely attributable to its hoar antiquity—the *coronator*, *coronarius* or *custos placitorum coronas* being one of the oldest officials known to English law. See a very interesting paper on the Early History of the Coroner, by Prof. Charles Gross (Pol. Sci. Quart. IV. 656), whence it appears that he even antedated the so-called articles of 1194, to which his creation is generally attributed (pp. 650, 656), and that among his ancient functions was the search for deodands and other forfeitures to the crown (p. 650 and note 4).

In HAMLET (act V. scene I), the two clowns digging the grave of Ophelia thus hold converse:

"Is she to be buried in Christian burial, that wilfully seeks her own salvation?

"I tell thee, she is; and therefore make her grave, straight; *the crowner hath sate on her, and finds it Christian burial* . . .

"But is this law?

"Ay, marry is't; *crowner's-quest law*."

The very fact that the scene of the play is laid in Denmark, in prehistoric days, demonstrates the antiquity of the institution in England.

<sup>62</sup> Nor should the critics of our bench and bar lose sight of the fact that determining and "laying down the law"—or advising what the law is supposed to be—in a given case, is a task immeasurably more difficult in the United States, than in any of the great countries of Europe. These have their fixed codes, drawn and altered only by men truly "learned in the law"—veritable jurisconsults; while we have our Congress, and forty-four state (as well as four territorial) legislatures, biennially—and in Massachusetts, New Jersey, New York, Rhode Island and South Carolina, even annually—resuming the task of tinkering laws with unabated vigor, and with little or no regard for constitutional forms: so that a certain Congressman is popularly believed to have asked Mr. Cleveland, when Governor of New York, to approve a bill of doubtful validity, in the words, "What's a little thing like the constitution among friends." When we consider the mental equipment and moral calibre of many of those who with us thus possess the initiative of legislation—taken in Parliament, for instance, only by the Government, composed of the leaders of the party in power,—it appears miraculous that our *corpus juris* is not more uncertain and chaotic.

<sup>63</sup> Our dual system—which associates with the permanent tribunal or court a casual body or jury—"by confiding to the judge the decision of all questions of law and practice, secures the law and the practice from being altered by any mistake, or even misconduct, of the jury; by treating as matter of law, and consequently within the province of the judge, the admissibility of evidence and the sufficiency, as a legal basis of adju-

woven with our social fabric, too deeply grounded in our political system, to be torn out by the roots during

dication, of any evidence that may be received, it prevents the jury from acting without evidence or on illegal evidence; and by intrusting the judge with the general oversight of the proceedings and the duty of commenting upon the evidence, it renders available his knowledge and experience. But, by taking out of the hands of the judge the actual decision on the facts and the application of the law to them, it cuts up a mechanical decision by the roots, prevents artificial systems of proof from being formed, and secures the other advantages of a casual tribunal. Besides, the difference that exists between the judge and jury, in station, acquirements, habits, and manner of viewing things, not only enables them to exert on each other a mutual and very salutary control, but confers an enormous moral weight on their joint action. . . . To these considerations must be added the constitutional protection which the presence of a jury affords to the free citizen—a matter too well known to need much explanation. Suffice it to say that it rests on the principle"—a principle recognized, as we have seen [*ante*, chaps. II. and III.] by the Ancients—"of leaving a portion of the judicial authority in the hands of the people, instead of vesting the whole in some exclusive or professional body. . . .

[Moreover], it is essential to remember that the consequences of the errors of the casual tribunal are immensely less. Theirs are mostly errors of impulse, and their consequences are almost entirely confined to the actual case in which they are committed. The errors of a fixed tribunal, on the contrary, are errors of system, and their effects are lasting and general. . . . Even as regards accuracy of decision, the advantage in deciding facts is on the side of the casual tribunal. From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness and earnestness to the inquiry, which the constant habit of deciding, adjudicating and punishing dims and blunts more or less in the mind of every judge. . . ."

"The description thus given of our common law tribunal shows it to be one of a compound nature,—partly fixed and partly casual,—and . . . so constructed as to secure very nearly all the advantages of each of the opposing systems, while it avoids their characteristic dangers." Best, *Ev.* (Chamberlayne's ed.) §§ 83, 85. See the same, p. 440 ff., for some consideration and illustrations of "Judicial Wrongs."

"Where the law is clear and precise, the duty of the [jural] tribunal is limited to ascertaining the existence of facts. . . . In order to draw a conclusion from them, nothing more is required than plain, ordinary good sense,—less fallacious than the learning of a judge accustomed to seek the proofs of guilt, and who reduces everything to an artificial system formed by study." Beccaria, *Crimes*, § 7.

this generation.\* The minds of the people are not yet ripe, nor is the ground prepared, for the propaganda of abolition.

We will close this treatise by quoting a passage—illustrative of the merits of trial by jury and forcibly advocating its maintenance—from the memorable speech of Lord Brougham, delivered in the House of Commons on the seventh day of February, 1828, which graphically described the abuses that had become engrafted on the law, and caused the inauguration of an era of legal reform. The orator said:

“Speaking from experience, and experience alone, as a practical lawyer, I must aver that I consider the method of juries a most wholesome, wise, and almost perfect invention, for the purposes of judicial inquiry. In the first place, it controls the judge, who might, not only in political cases, have a prejudice against one party or a leaning towards another . . . or, what is as detrimental to justice, their counsel or attorneys. In the second place, it supplies that knowledge of the world, and that sympathy with its tastes and feelings, which judges seldom possess and which, from their habits and station in society, it is not decent that they should possess, in a large measure, upon all subjects.

“In the third place, what individual can so well weigh conflicting evidence, as twelve men indifferently chosen from the middle classes of the community, of various habits, characters, prejudices and ability? The

\* “Trial by Jury is still to the average legislator the embodiment of the wisdom of all the ages, and is so firmly entrenched in the traditions of the people that another generation at least must pass before its defects will even be accorded a respectful consideration.”—*Judge H. B. Brown*, 20 Am. L. Rev. 340.

number and variety of the persons is eminently calculated to secure a sound conclusion upon the opposing evidence of witnesses or of circumstances.

"Lastly, what individual can so well assess the amount of damages which a plaintiff ought to recover for any injury he has received? How can a judge decide half so well as an intelligent jury, whether he should recover as a compensation for an assault £50 or a £100 damages? . . .

"The system is above all praise—it looks well in theory and works well in practice . . . I would have all matter of fact, wheresoever disputed, tried by a jury." . . .

"In my mind, he was guilty of no error,—he was chargeable with no exaggeration,—he was betrayed by his fancy into no metaphor, who once said that all we see about us, king, lords and commons, the whole machinery of the state, all the apparatus of the system and its varied workings, end in simply bringing twelve good men into a [jury] box. Such—the administration of justice—is the cause of the establishment of government—such is the use of government; it is this purpose which can alone justify restraints on natural liberty—it is this only which can excuse constant interference with the rights and the property of man."

<sup>66</sup> Speech on the Present State of the Law (London ed. 1828) pp. 84, 85, 99, 100.

The peroration here subjoined appears *Ibid.* p. 5.

## APPENDIX.

A synopsis of the American Constitutional Guarantees of Trial by Jury is attempted in the following pages.

Reference to the respective laws governing the Federal courts,<sup>1</sup> the territories, and the District of Columbia—amendments V. VI. and VII. adopted by the first Congress of the United States in 1789—has already been made, *ante*, chap. IX.

It remains to consider briefly the special provisions of the several states on the subject of our investigations.

"The states," says Hare (Am. Const. Law, lect. XXXIX. and cases cited at p. 860) "are free to adopt any mode of procedure which is consonant with the principles of jurisprudence and calculated to promote the ends of distributive justice. The Federal guaranty is confined to the national courts, and does not preclude the states from authorizing their tribunals to decide civil or even criminal issues without submitting them to a jury. . . . An inference may be drawn from the terms employed in the Federal Constitution and the

<sup>1</sup> As to the selection and qualifications of jurymen in these courts, Taney, *Ch. J.*, observed:

"The Judiciary Act of 1789, section 20, provides for the manner of examining jurors, and directs that in all cases—of course, including criminal as well as civil cases,—they shall be designated by lot or otherwise, in each state, according to the mode of forming jurors therein as there practiced, so far as the law of the state shall, under such designation, be practicable by the courts or marshals of the United States; and that jurors shall have the same qualifications as were requisite for jurors by the law of the state of which they are citizens, in the highest court of law in the state." *United States v. Reid*, 53 U. S. 12 How. 361, 13 L. ed. 1023.

organic laws of the several states . . . that the purpose was not to extend the right, but to forbid any change which would circumscribe it."

So in *Haines v. Levin*, 51 Pa. 414, it is said that constitutional guarantees secure the right of trial by jury *as then existent*, and protect it "from innovations which might destroy its sufficiency as a palladium of the liberties of the citizens."

It has been held that the legislature may, in creating a new offense, withhold the right to trial by jury, because it did not fall within the line of cases so triable at common law and "at all events the statute did not render them less numerous." *Van Swartow v. Com.* 24 Pa. 131. The contrary view has been sustained in California.

The aim of the Constitutional guaranty—says Hare (*supra*, p. 886)—"is not that the legislature may introduce new exceptions, but that there shall be none save those which existed when the organic law was passed.

. . . The inquiry should not be: is the instance specifically new, but does it belong to a class in which the accused was entitled to the verdict of his peers?" Hence a view better calculated to promote this object, than that adopted in the case last cited, was taken by the judges in *Wynehamer v. People*, 13 N. Y. 378. Cf. *ante*, chap. IX. note 65, chap. X. note 38.

Louisiana—whose jurisprudence, alone of all the states, is based on the civil or Roman law—originally provided only for a criminal jury (Old Const. title I. art. 6): "Prosecutions shall be by indictment or information. The accused shall be entitled to a speedy public trial by an impartial jury of the parish in which the offense was committed, unless the venue be changed."

The Constitution of 1879 re-enacted the first sentence of this clause in Art. 5, and provided in Art. 7: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial by an impartial jury, except that, in cases where the penalty is not necessarily imprisonment at hard labor or death, the General Assembly may provide for the trial thereof by a jury less than twelve in number."

The civil jury was engrafted on the judicial system of the state by Art. 116 :

"The General Assembly at its first session . . . shall provide by general law for the selection of competent and intelligent jurors, who shall have capacity to serve as grand jurors and try and determine both civil and criminal cases, and may provide in civil cases that a verdict be rendered by the concurrence of a less number than the whole."

The legislature accordingly (Act of 1880, p. 141) prescribed that nine out of twelve jurors may render a valid verdict in civil cases, while in criminal cases unanimity is required.

Turning to the other or common law states, we find provisions for the maintenance of jury trial (differing in detail, but substantially agreeing in principle) as a part of their civil procedure, in the constitutions of all. That of New York has already been cited, *ante*, chap. IX. By way of comparative illustration, those of two other states are subjoined:

"The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty, or property

without due process of law." (Iowa, art. I. § 9.)  
 "The right of trial by jury shall be secured to all; but in all civil cases a jury trial may be waived by the parties in the manner to be prescribed by law." (Florida, art. I. § 4.)

An outline of the provisions made by the several states of the union is presented by means of reference to those contained in the new Constitution of California which (1879) introduced marked innovations on trial by jury.

Art. I. § 7: "The right of trial by jury shall be secured to all, and remain inviolate," but in civil actions three fourths of the jury may render a verdict.\*

\* So by the Constitutions of

Ala., Art. I. § 13	Ark., II. 7	Cal., II. 23	Conn., I. 21
Del., I. 4	Fla. Dec. Rights, 4	Ga., III. 13	Idaho, I. 7
Ill., II. 5	Ind., I. 20	Iowa, I. 9	Kan. Bill of Rights, 5
Ky., XIII. 8	Me., I. 20	Md., XV. 6	Mass., Pt. I. 15
Mich., VI. 27	Minn., I. 4	Miss., III. 31	Mont., III. 23
Mo., II. 28	Neb., I. 6	Nev., I. 3	N. C., I. 19
N. Dak.,	N. H., Pt. I. 20	N. Y., I. 2	N. J., I. 7
Ohio, I. 5	Oregon, I. 18	Pa., I. 6	R. I., I. 15
S. C., I. 11	S. D., Bill of Rights, § 6	Tenn., I. 6	Tex., I. 15
Va., I. 13	Vt., II. 31	Wash., I. 21	W. Va., III. 13
Wis., I. 5	Wyo., I. 9	For La., see ante.	

Tennessee provides for the right to demand a jury in equity cases, but the provision is practically a dead letter. Also, Ariz. Bill of Rights 8; New Mex. § 6. 1.

\* Three fourths Rule prevails also in Idaho (Art. I. § 7, Rev. Stat. § 3988), Louisiana (cf. ante), Nevada (Art. I. § 3) S. D. (Bill of Rights, § 6) Texas (Art. V. § 13), and Wash. (Art. I. § 21).

By statute in South Dakota three fourths may render a verdict "in civil cases cognizable by a justice of the peace," other than those affecting real property, though the constitution (Bill of Rights, § 6) empowers the legislature to authorize such in all cases. Similarly, the number of jurors may be decreased by written agreement of the parties, or their consent in open court.

In Wyoming, the inviolability of the jury is constitutionally guaranteed "in criminal cases" only. Grand juries shall consist of twelve men, any nine of whom may find a valid indictment, "but the legislature may change, regulate or abolish the grand jury system."

Two thirds may render a verdict in Montana (Art. III. § 23) "in all

"A trial by jury may be waived, in all criminal cases not amounting to felony, by the consent of both parties expressed in open court,—and in civil actions by the the consent of the parties." . . . In civil actions and cases of misdemeanor, the jury may consist of twelve, or any number less than twelve upon which the parties may agree in open court."<sup>4</sup>

civil actions and *in all criminal cases not amounting to a felony*," while in Idaho (Art. I. § 7, Rev. Stat. § 7781), "*in all cases of misdemeanors, five sixths of the jury may render a verdict.*"

In California, a movement looking to the same end has been started of late.

[In the New Jersey legislatures of 1882 and 1883, Mr. J. H. Goodwin zealously advocated an amendment abolishing unanimity in civil cases, and barely failed of success.]

<sup>4</sup> *Waiver in Civil Actions* is likewise permitted by the Constitutions of

Ark., Art. II. § 7	Colo., II. 23	Fla., Dec. Rights, 4	Md. IV. 1, 8
Mich., VI. 27	Minn., I. 4	Nev., I. 8	
N. Y., I. 2	Vt., II. 31	Wash., I. 21	W. Va. II. 13
N. C., V. 13	Pa., V. 27, Tex., V. 10	Also Ariz., Bill of Rights, 82.	
Wis., I. 5	By Statute in Wyoming.		

According to 20 Am. L. Rev. 671, 672, waiver likewise prevails in Ill., Mo. and N. J., while, in New Hampshire, trial by jury is said to be "the exception and not the rule," ever since the Constitution of 1876, confirming a custom of waiver long indulged in the courts of the state, swept away jury trials in a large class of cases—i. e. in all where the amount in controversy does not exceed \$100. So in Massachusetts, there is ordinarily no jury in a civil suit, "unless insisted on by one party or the other" (chap. XII, note 54.)

Waiver in all civil and in "criminal cases not amounting to felony" is allowed in Idaho (Art. I. § 7) Montana (Art. III. § 23) and North Dakota. Also (by Statute) in South Dakota, in cases arising in courts of justices of the peace. And in New Mexico (Act of July 12, 1851, § 8) the accused may in all cases waive jury trial.

In Wyoming, "it is necessary in order to obtain a jury in civil cases, that it be demanded and the jury fee deposited." (Att'y General Potter, in letter dated April 24, 1893.)

By Act of Congress, jury trial prevails in the District of Columbia. The Act organizing Oklahoma territory (passed May 2, 1890) makes no provision for trial by jury.

<sup>5</sup> The Number of Jurors may similarly be limited in Colo. (II. 23), Fla. (VI. 12), Idaho (Art. II. § 7, Rev. Stat. § 7781), Iowa (I. 9), La. (VI.), Mich. (IV. 46), Mo. (IV. 23), Mont. (III. 23), Neb. (I. 6), N. J. (I. 7), N. D. (I. 7), Wash. (I. 21), and Wyo. (I. 9.)

Trial by jury is—by such constitutional provisions—secured in all common law actions. *Edwards v. Elliott*, 36 N. J. L. 449 ; *Grim v. Norris*, 19 Cal. 140.

This applies only to actions at law or criminal actions, where an issue of fact is made by the pleadings. *Koppikus v. State Capitol Comrs.* 16 Cal. 248.

“It cannot be claimed in equity cases, unless such issue be specially framed for a jury under the direction of the court. It cannot be asserted upon an issue of law, for that is a matter purely for the court.” *Ibid.* p. 254, per Field, *Ch. J.*

Other cases in which jury trial may not be claimed as a common law right are instanced by Hare (Am. Const. Law, 869–873 and cases cited) as follows: summary proceedings to dispossess tenants; questions arising on *quo warranto*; cases of admiralty and maritime jurisdiction, even where extended to controversies not originally within its scope; transgressions amounting to a contempt of court; proceedings to assess damages due for property taken for public use, in the exercise of the right of eminent domain; tax assessments; proceedings to determine that a person is insane or an habitual drunkard, and to appoint a guardian of his person or property; a summary proceeding to disbar an attorney on account of acts for which he might be indicted and tried by a jury. *Ex parte Wall*, 107 U. S. 265, 27 L. ed. 552. In all these cases—in absence of a statute to the contrary, the action of the court alone “is due process of law. . . . practiced from time immemorial.”

Such limitation is also authorized, for inferior courts, such as justices of the peace, in Ga., Ill., Iowa, Neb., N. C., Tex. and West Va. (*vide Stimson's Am. Statute Law*, § 73).

But a municipal corporation, being only the creature of the legislature, cannot claim the constitutional right of trial by jury. *Dunmore Borough's App.* 52 Pa. 374.

Criminally, jury trial extends only to prosecutions by indictment or information—not to cases created by statute (*Tims v. State*, 26 Ala. 165); nor to the trial of officials so created. *Boring v. Williams*, 17 Ala. 510.

A provision that jury trial “shall remain inviolate” does not mean that there must be a jury in all cases. *Flint River S. Co. v. Foster*, 5 Ga. 194.

It does not apply to proceedings before justices of the peace (*Goddard v. State*, 12 Conn. 454) nor to summary remedies given by statute, as the summary convictions of vagrants (*Flint River S. Co. v. Foster*, 5 Ga. 194; *Byers v. Com.* 42 Pa. 89; *Haines v. Levin*, 51 Pa. 412) nor to proceedings for ascertaining the value of property taken for public uses. *Koppikus v. State Capitol Comrs.* 16 Cal. 248.

A legislature may regulate the manner of trial by jury (*Richards v. Hintrager*, 45 Iowa, 253) or may prescribe a change of venue in certain cases (*Taylor v. Gardiner*, 11 R. I. 182) or may substitute new modes of trial by reasonable regulations (*Beers v. Beers*, 4 Conn. 539; also *Curtis v. Gill*, 34 Conn. 54) and may even clog the right by onerous conditions, unless the right be thereby totally prostrated. *Flint River S. Co. v. Foster*, 5 Ga. 194.

But a legislature cannot give a tribunal acting without a jury the power to determine legal rights—unless there be some equitable grounds of relief. *Haines' App.* 73 Pa. 169.

Cal. Art. VI. § 19: “Judges shall not charge juries

with respect to matters of fact, but may state the testimony and declare the law."

This provision is followed by Ark. (VII. 23) ; Nev. (VI. 12); S. C. (IV. 26); Tenn. (VI. 9); and Wash. (IV. 16).

Under this peculiar provision it has been held, that the court may instruct the jury that testimony has been introduced tending to prove a certain matter (*People v. Vasquez*, 49 Cal. 560) but the judge may neither instruct, nor even express an opinion, upon the weight of evidence, nor on controverted facts. *People v. King*, 27 Cal. 509 ; *People v. Dick*, 34 Cal. 663 ; *People v. Walden*, 51 Cal. 588. So it is error in a court to charge a jury that the existence of a fact raises a presumption of the existence of another fact. *McNeil v. Barney*, 51 Cal. 603.

The policy of this provision is discussed in *People v. Taylor*, 36 Cal. 255.

## ADDENDA.

(pp. 1, 128, 151) "When the English adopted trial by jury, they were a semi-barbarous people. . . . They soon spread beyond their insular boundaries to every corner of the habitable globe . . . but wherever the English have been, they have boasted of the privilege of trial by jury." DE TOCQUEVILLE, *Democracy in America*.

(pp. 78-82, 90) "Ordeals,"—observes the elder Disraeli, in a paper on Trials and Proofs of Guilt in Superstitious Ages, in his "Curiosities of Literature"—"are, in truth, the rude laws of a barbarous people who have not yet sufficiently advanced in civilization to enter into the refined inquiries, the subtile distinctions, and elaborate investigations, which a court of law demands."

(pp. 117, 127 note, ¶ 3) In connection with the impeachability of verdicts for irregularities or misconduct of jurymen, the supreme court of South Carolina recently held (*State v. Bennett*, 26 S. E. Rep. 886) that a verdict should not be reversed on the affidavit of a juror, who had consented to a verdict of guilty only because he believed that an accompanying recommendation of mercy would assure the defendant's pardon on commutation of sentence. The court, after observing that "such recommendations can have no effect whatever upon the verdict regularly and solemnly rendered," concludes that reasons of public policy forbid jurors to

declare "an intent different from that actually expressed by their verdict as regularly rendered in open court."

Matters extraneous to the record, constituting improper conduct of the jury, may be shown by affidavits of *third parties*, such as that the jurors or some of them received improper communications while deliberating on the verdict, *Craw v. Daly*, 2 N. Y. Code Rep. 118; that spirituous liquors were circulated among them, *Rose v. Smith*, 4 Cow. 17; or that they found their verdict by separately marking down the amount each favored and then dividing the aggregate by the number of jurors, *Harvey v. Rickett*, 15 Johns. 87.

In criminal trials, spirituous indulgence not culminating in intoxication will vitiate a verdict, the defendant being entitled to have a juror "consider and pass upon his case with faculties unimpaired with drunkenness," nor "beclouded by the previous night's debauch." *Brown v. State* (Ind.) 36 N. E. Rep. 1108; cf. *Ryan v. Harrow*, 27 Iowa, 494; *Jones v. State*, 13 Tex. 168; *State v. Cucuel*, 31 N. J. L. 249.

(pp. 127 note, ¶ 1, 155, 156) The trial jurors in Scotland—where there are no grand juries—take this quaint oath: "You fifteen swear by Almighty God, as you shall answer to God, at the great day of judgment, you will the truth say and no truth conceal, in so far as you are to pass upon this assize." See an interesting paper on the Criminal Law in Scotland, 6 Am. Law Rev. 427-449, whose author also defends the verdict of Not Proven as logical, and criticizes that of Not Guilty as superfluous or illogical, in that thus juries often "are compelled to say, proved 'not guilty,' when it is all they can do, with a good conscience, to say 'not proved' guilty."

(p. 127 note, ¶ 2) Already before the passage of Fox's Act, the King's Bench had, in 1783, sustained the right of the jury in cases of libel to pass both on the law and the facts. *Rex v. Shipley*, 4 Dougl. 73.

(p. 127 note, third par.) In connection with the power of a court to reverse verdicts on the facts, the very recent case of *Heusner v. Houston, W. S. & P. F. R. Co.* 7 Misc. 48, should be noted, where *Mr. Justice Bookstaver* exhaustively reviews the authorities, and a verdict was set aside by the general term of the common pleas because "evidence was not properly weighed by the jury." Among the many cases cited are *Kummer v. Christopher & T. Street R. Co.* 2 Misc. 298, where *Mr. Justice Pryor*, writing the opinion, stigmatizes the plaintiff's case as "a fabrication," and, "in view of the prevalent disposition of juries in cases of personal injury to award damages against corporations upon slight or equivocal evidence," deems it the imperative duty of appellate tribunals "not to relax that supervision of their determinations which the law exacts of us in the interests of public justice." "By doing so, no right is taken away. The effect of setting aside the verdict is simply to subject the case to further consideration by another jury." Per *Daly, Ch. J., Clark v. Merchants Bank*, 8 Daly 504.

In general it may be observed that larger latitude and greater discretion in dealing with facts and controlling juries is conceded to English judges than to their brethren in the United States.

(p. 129 note) The work of Brinton Coxe on Judicial Power and Unconstitutional Legislation, just posthumously published, presents the best historical study and critical analysis of the right and power

of the Federal judiciary to declare void an Act of Congress.

(pp. 138 note, 228 note) The opinion in *Hess v. White* (Utah) 33 Pac. Rep. 243, relies upon the assumed analogy of the decision of the United States Supreme Court in *Hurtado v. California*, 110 U. S. 516, 23 L. ed. 232 (cf. *ante*, p. 168, note 18) and cites with approval this proposition: "Administration and remedial proceedings must change, from time to time, with the advancement of legal science and the progress of society." *Rowan v. State*, 30 Wis. 129.

(p. 148 note) In Nevada the grand jury consists of twelve, eight of whom are sufficient to find an indictment. (Laws of 1893, chap. 46.)

(pp. 152 note, 231) Summary convictions for petty offenses, and the confiscation of articles of trifling value employed in the commission of such, by a magistrate, without the intervention of a jury, have been sanctioned by the Federal Supreme Court as practices to which "constitutional provisions, which are intended for the protection of substantial rights," are inapplicable. *De minimis non curat lex*.

"There is not a state in the Union which has not a constitutional provision entitling persons charged with crime to a trial by jury, and yet, from time immemorial, the practice has been to try persons charged with petty offenses before a police magistrate, who not only passes upon the question of guilt, but metes out the proper punishment. This has never been treated as an infraction of the Constitution, though technically a person may in this way be deprived of his liberty without the

intervention of a jury. . . . So, the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard." *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. —, citing *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223; *State v. Snover*, 42 N. J. L. 341.

(p. 181 note ) The change in the common law rule was wrought in New York by Laws 1872, chap. 475, providing that a juror who had formed or expressed an opinion was nevertheless competent, if he swore that he verily believed himself competent to render an impartial verdict according to the evidence unbiased by his prior opinion, and if the court was satisfied that such opinion would not influence his verdict. This provision was essentially re-enacted in the Criminal Code (§ 376); cf. *People v. McGonegal*, 136 N. Y. 62.

But in civil cases, the strict common law rule, insisting on total absence of opinion and entire freedom from bias, still prevails; cf. *Halsted v. Manhattan R. Co.* 26 Jones & S. 270.

(p. 201 note) Where it is apparent upon the record of a case that the wrongful act complained of was not the proximate cause of injuries sustained, the question at issue is one for adjudication by the court, not for determination by the jury. *Scheffer v. Washington City, V. M. & S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Klye v. Healy*, 127 N. Y. 555, 562; *Robertson v. New York*, 7 Misc. 645.

(p. 228 note) Montana seems to have been the pioneer, in the United States, in the matter of invading the hoary requirement of unanimity. Its territorial legislature, in January, 1869, passed an act providing that three fourths may render a valid verdict in civil cases. This enactment came incidentally before the Federal Supreme Court in *Dunphy v. Kleinschmidt*, 78 U. S. 11 Wall. 610, 20 L. ed. 223, which, however, refrained from passing on the question of its contravening trial by jury as guaranteed in the United States Constitution.

In Kentucky (Laws 1892, chap. 116) three fourths of the jury may now render a verdict in civil actions.

(p. 229 note ) According to the N. Y. Code Civ. Proc. § 1009, a party may waive his right to the trial of an issue of fact by a jury, by failing to appear at the trial—by filing a written waiver before the trial—by oral consent in open court—by moving, or acquiescing in the adverse party's moving, the trial of an action without a jury; *e. g.* at special or equity term. *Mackellar v. Rogers*, 109 N. Y. 468.

In this event, the decision is of course by the court, except that, upon the consent of the parties, in most cases (*id.* §§ 1011, 1012) or upon the court's own motion, in a case involving the examination of a long account and not requiring the decision of difficult questions of law (*id.* §§ 1013, 1015) a referee, who "must be free from all just objections" (*id.* § 1023) will be appointed to hear and determine all the issues, or to report his findings upon one or more specific questions of fact to the court, subject to its confirmation. When acting in the latter capacity, their functions bear much resemblance to those of the Roman *Judices*.

Referees—whom an old New York statute required to be not “more than three or *less than one* in number”—are “a legislative substitute for a trial by jury” and their report “is to be regarded in the same light as a verdict.” *Alexander v. Fink*, 12 Johns. 219. References are criticized as costly, cumbersome and procrastinating, but defended as obviating for the judiciary the drudgery incident to the examination of long accounts or other minutiae. They may, perhaps, be termed an inadequate surrogate for trial by jury, but a frequently convenient helpmeet to the judge. See, generally, Cooper on Referees and References.

Conversely, where a party is not entitled to trial by jury as a matter of right, the court may, at its discretion, direct one or more questions of fact, presented by the pleadings, to be tried by a jury. N. Y. Code Civ. Proc. § 971; *Church v. Freeman*, 16 How. Pr. 294.

But a reference in a matrimonial action cannot be ordered except by consent, the question of adultery being triable by jury as a matter of right. *Batzel v. Batzel*, 10 Jones & S. 561 (cf. Code Civ. Proc. §§ 970, 1757) where Judge Freedman remarks: “Although the issue or issues evolved by the pleadings were, according to the course of the ecclesiastical law, tried not by a jury but by the judge . . . and although the practice of the court of chancery, as it existed while this state was a colony, dispensed with trial by jury in all cases except when specially directed by the court, the issue of adultery was, in this state, always required to be specially submitted”—by successive enactments of the state legislature—to “a jury of the county, at some circuit court.”

(p. 224, note) In connection with the legislative grist-mill, we cannot refrain from translating an apt passage from the *Mirza Schaffy* of Friedrich Bodenstein:

My presence at the Council was required,  
Upon the Shah's behest:  
"Now, Mirza, let, on all that hath transpired,  
Thy judgment be expressed."

Quoth I: "I'll speak without equivocation,  
And not a thought conceal:  
Full well I heard the mill-wheel's loud vibration —  
But I beheld no meal!"

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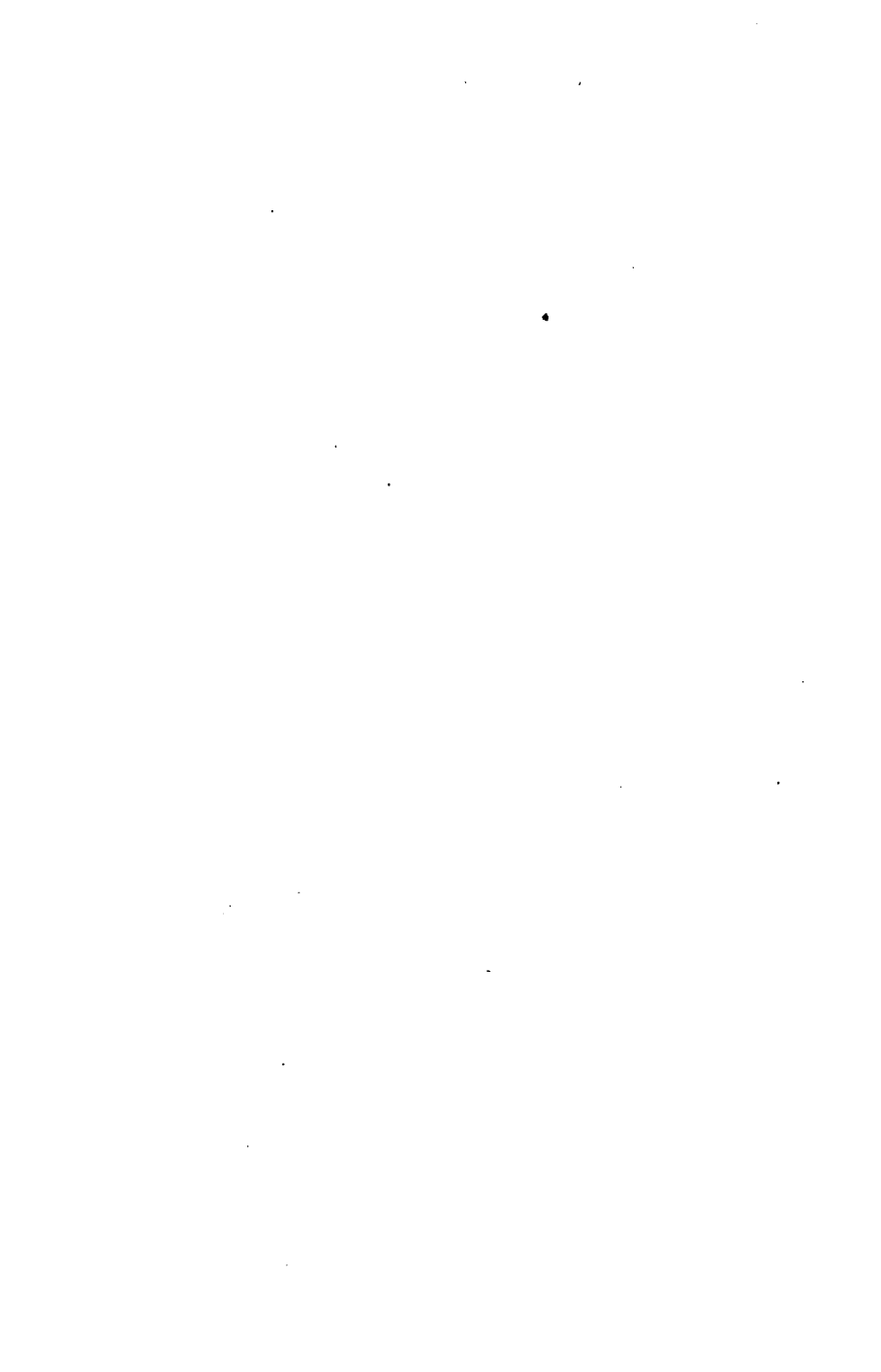
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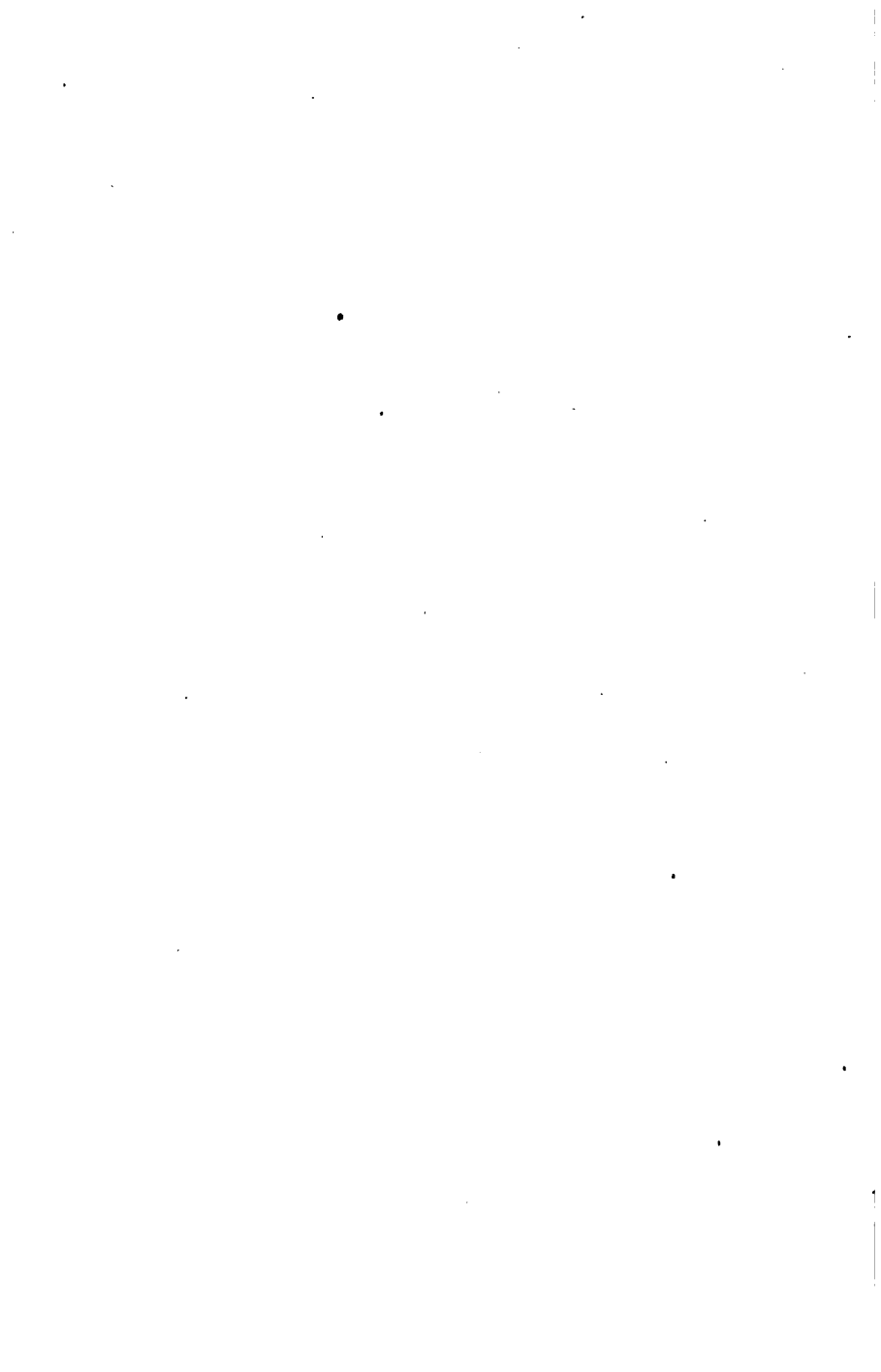
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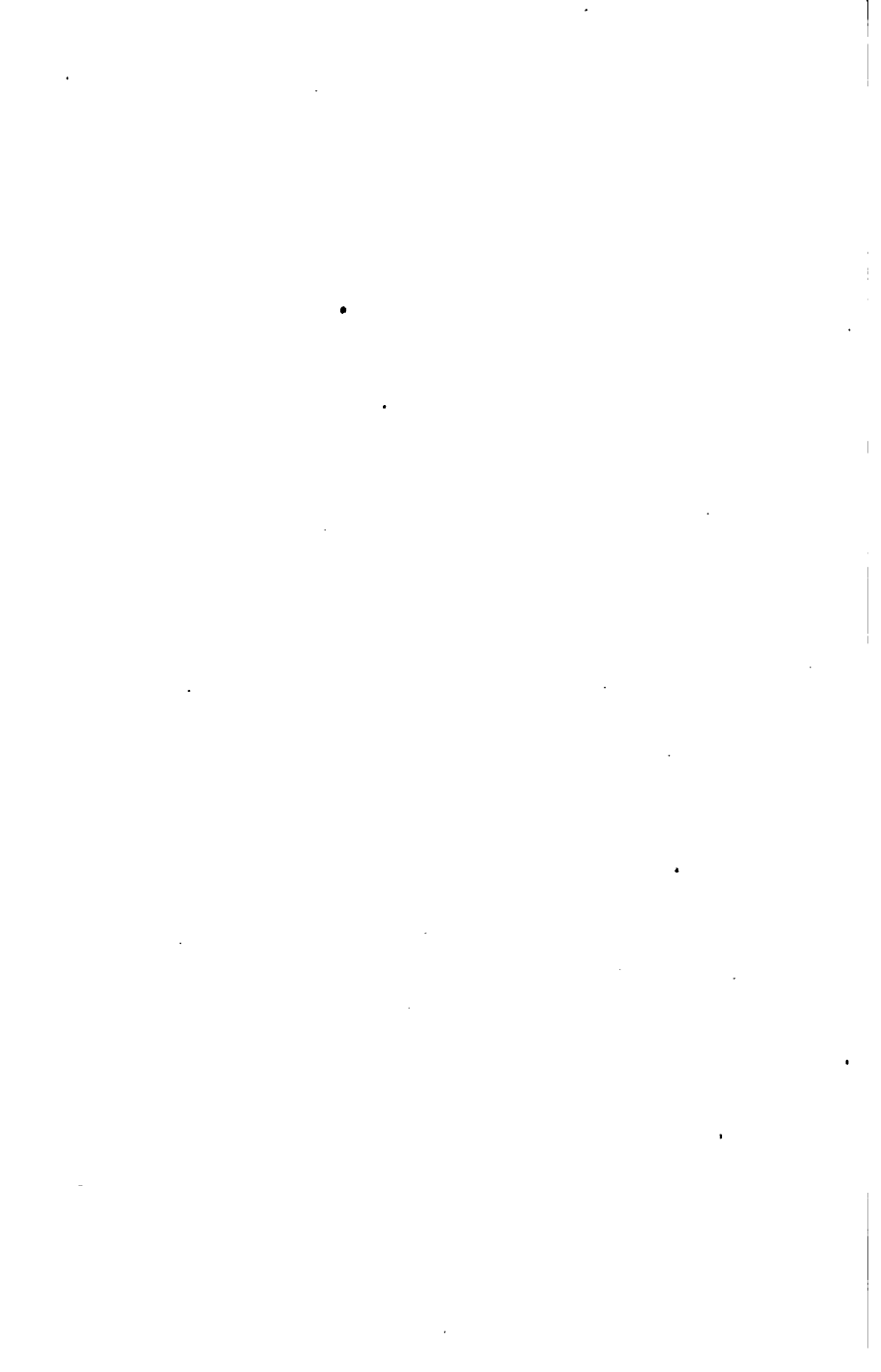
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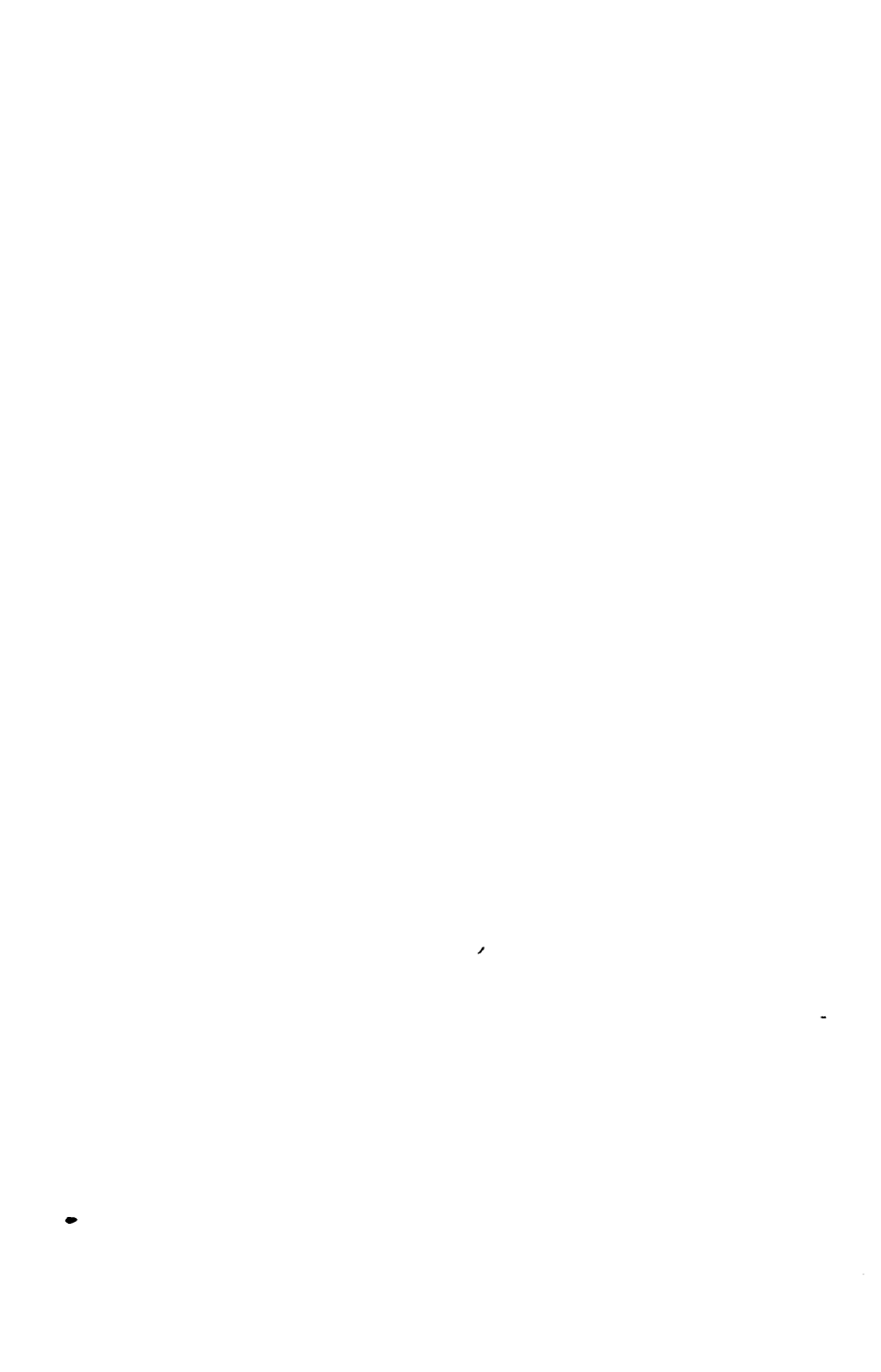




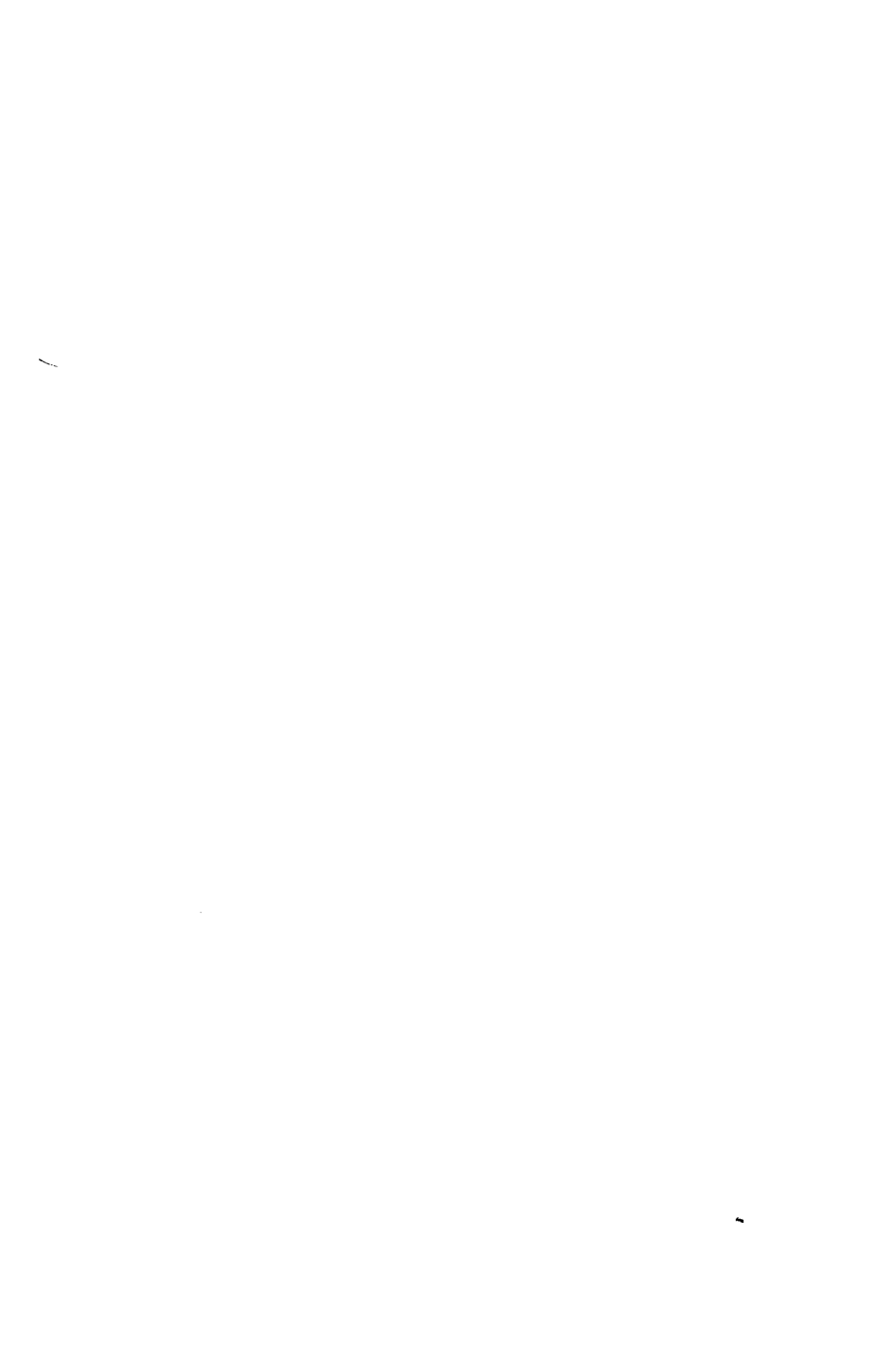














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